92-1504

No.

Supreme Court, U.S.
FILED
MAR 16 1993
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

MITRA KOOHI, et al,
Petitioners,

VS.

UNITED STATES OF AMERICA, et al,
Respondents.

Petition For Writ Of Certiorari To
The United States Court of Appeal
Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE ALBION BAILEY,
A PROFESSIONAL CORPORATION
BRUCE ALBION BAILEY, ESQ.
1800 Trousdale Drive
Burlingame, California 94010
Telephone: (415) 692-2400
Attorneys for Petitioners

March 11, 1993

QUESTIONS PRESENTED FOR REVIEW
(Rule 14.1.(a))

Does the Ninth Circuit Court of Appeal have the constitutional and statutory authority to determine that a state of war existed between the United States of America and the Islamic Republic of Iran on July 3, 1988, or alternatively, the authority to modify the Federal Tort Claims Act, 28 U.S.C. 2680(j) to delete the requirement "during time of war" for that exception to waiver of sovereign immunity.

Did the court below have authority to dismiss civilian contractor defendants on the ground of a newly created war time contractors immunity. Does a judicial determination of "war" require at minimum some form of official order or public act to the effect that hostilities exist between nations?

LIST OF ALL PARTIES TO THE PROCEEDING UNDER REVIEW
(Rule 14.1.(b))

The names of all the parties in United States Court of Appeal Case No. 90-16107, identified as *Mitra Koohi, et al. v. United States of America, et al.* are set forth in the caption of the case.

The named plaintiffs in the consolidated case, *Elizabeth H. Bailey, as a Personal Representative, et al. v. Varian Associates, Inc., et al.*, United States Court of Appeal number 90-16159 as set out in plaintiffs' First Amended Complaint for Damages for Wrongful Death filed with the District Court on June 10, 1989.[1] (Record below Excerpts

---

[1] Mariani Caputo, Anaelisa Caputo and Guiseppe Caputo, heirs of Anthony Caputo, deceased.

Rashid Ahmed, Hafiza Begum Ahmad, Colonel Ziauddin Arshad, Major General Waheeduddin Arshad, Rashiduddin Arshad, Kalim Arshad, Saliduddin Arshad and Mesdin Arshad, heirs of Captain Munir Arshad, Wajiha Arshad, Ahrima Arshad and Aripa Arshad, deceased. Parveen Seyed, Syeyed Saeed Ashansharzad and Seyed Hasib Ashansharzad, heirs of Seyed Mohammad Ashansharzad, deceased.

Anias Bahauddin, Mohammad Bahauddin and Morias Bahauddin, heirs of Mohammad Bahauddin, deceased.

Hassan Askari Urfee, Aziza Urfee, Riaz Ahmad Khan Sherwani and Habiba Sherwani, heirs of Azizul Hassan Urfee, M.D., Wajiha Urfee, Sehba Iran Urfee, Aman Ali Urfee, and Mohammad Ali Urfee, deceased.

L.R. Shamala, Chi K.P. Ajay, Kum K.P. Cowri Rao, K. Bathy Anarayana Rao, K.S. Lalithamma, K.S. Sudhakar Rao, K.S. Rayesake Rao, K.S. Raghauendre Rao, K.S. Suvendra Rao and K.S. Usha Rao, heirs of Dr. K.S. Prabhakava Rao.

Smt Eli Sankhamma, R. Subba Rao, China Appa Rao, Veere Raju Rao, Smt Uba Sarswati and Smt Venta Pally Suranna, heirs of R.S. Raman, M.D., R. Sai Prabba, R. Ramkiran Raman and Rukkala Kalpano Raman, deceased.

Homeirah Azizian, Aryanaz Resaiian, Elnaz Resaiian, Amir Abbas Resaiian, heirs of Capt. Mohsen Resaiian.

Manighe Naghshbandi, Kalsoum Arson, Saeedeh Arson, Faemahgol Arson and Abdul Hadi Arson, heirs of Abdulrahim Arson.

Sharifeh Rafaty, Mohammed Abrahim Miham Abdul Rahim Ansarian, Omid Ansarian, Fatima Ansarian, Mohammed Ansarian, Farkhomdeh Ansarian, Abdul Rahim Ansarian, Amir Ansarian, Mehdi Ansarian, Hessamaldin Ansarian, Mohammed Ibrahim Ansarian, Kolsum Ansarian, Ivima Jalali and Abdul Majadie Jalali, heirs of Ibrahim Ansarian.

Fatemeh Ashoubi, Khaled Shayan, Gholam Ali Shayan, Nadieh Shayan, Shabnam Shayan, Ghadvieh Shayan, Kheirieh Ashoudi and Ali Akbar Ashoubi, heirs of Mohammad Ebrahim Shayan, deceased.

Mohamad Samadi, Fahimeh Samadi, Ismaeel Samadi and Zohreh Samadi, heirs of Abdoulreza Samadi, Sakineh Vegdani, Ashraf Samadi, Fatemeh Samadi, Tahereh Samadi and Hamideh, deceased.

Abdulrazzah Kamali, Mohammed Hadi Honan, Fatemeh Faghigi, Sassan Kamali, Sami Kamali and Samar Kamali, heirs of Sadigeh Honar and Saeed Kamali, deceased.

Enayatollah Douzandeh, Abdulla Douzandeh, Mohamad Douzandeh, Hassan Douzandeh, Mojeseh Douzandeh, Abdul Rahim Douzandeh, Fatemeh Douzandeh, Ahmad Douzandeh, Sakineh Douzandeh, and Fouzieh Douzandeh, heirs of Mohamad Fathali Douzandeh, Halima Abdulla Osloob, and Arif Mohamad Douzandeh, deceased.

Iran Ahmadi, Nahi Gholipour, Sakineh Gholipour, Fereshteh Gholipour, Fouzieh Gholipour, Farideh Gholipour, Ahmad Ahmadi and Sakineh Rezai, heirs of Mohammad Gholipour, deceased.

Hasan Behzadi, Fatemeh Golparkook, Fatemeh Khanom Jahandideh, heirs of Mohamad Aghil Behzadi and Shmseddin Behzadi, deceased.

Ozra Mozafar Zadegan, Shahi Shiri, Nasser Khodadadi, Alireza Khodadadi, Mohammad Javad Khodadi, Sayeed Khodadadi, Fazel Khodadadi, Sogra Khodadadi, and Fatemeh Khodadadi, heirs of Mohamad Ali Khodadadi, deceased.

Sultan Ibrahim Sultan, Abdoulah Pam, Mohammad Pam, Tahereh Pam, heirs of Ebrahim Pam, deceased.

Mohammad Gholami, Zahra Pourshams, heirs of Shahreban Ejdehai, deceased.

Leila Samimi, Zahra Johngohari, Nargess Johngohari, Zeynab

Johngohari, Nahio Johngohari, Safa Johngohari, Younes Johngohari, and Yousef Johngohari, Sohrab Johngohari, and Zeynab Johngohari, heirs of Nadar Johngohari, deceased.

Parvin Hassan Zadeh, Niloofar Jeddi Kazaerouni, Maryam Jeddi Kazerouni, Ali Jeddi Kazerouni, Khodrahm Jeddi Kazerouni, Zamman Jeddi Kazerouni, Foroug Jeddi Kazerouni, and Arash Jeddi Kazerouni, heirs of Mohammad Hossein Jeddi Kazerouni, deceased.

Ameneh Shahdousti, Iraj Hosseinpour, Ahmad Hosseinpour, Ayoub Hosseinpour, Adnan Hosseinpour, Somieh Hosseinpour, Ali Hosseinpour, Roghieh Salary, and Zohreh Raezssi, heirs of Akbarali Hosseinpour, deceased.

Abdulreza Kargozar and Amemeh Mohamad Kali, heirs of Kheyralnessa Mohammad Kali, deceased.

Mariam Latifi, Mariam Latifi, Soraia Latifi, Abdul Aziz Latifi, Naser Latifi, Ahmad Latifi, Zari Latifi, Abdoulah Latifi, and Mustafa Abdulla Mohamad Latifi, heirs of Ismaeel Abdulla Mohamad Latifi and Mohtaram Latifi, deceased.

Mohammad Son of Mohammad Aminkorkin, Sima Mohammad Aminkorkin, Amin Mohammad Aminkorkin, Mahmoud Mohammad Aminkorkin, Arash Mohammad Aminkorkin, and Mariam Ahmad Aminkorkin heirs of Fatemeh Mohammad Aminkorkin and Simin Mohammad Aminkorkin, deceased.

Zahra Jafarzadeh, Assadollah Jafarzadeh, Yousef Jafarzadeh, Kheyri Jafarzadeh Massoumeh Jafarzadeh, Sakineh Jafarzadeh, Zaynab Jafarzadeh, Mousa Ahmad Jafarzadeh, Ali Ahmad Jafarzadeh, and Hossein Jafarzadeh, heirs of Ahmad Jafarzadeh (Bebenazanin), deceased.

Azizeh Ahmadi, Asmae Ahmadi, Latifeh Ahmadi, Mahin Ahmadi, Abdur Razagh, Ismail Ahmadi, Ahmad Ahmadi and Amenah Hassani, heirs of Juma Ahmadi.

Omid Ali Bandi, Zeinab Bandi, Ali Bandi, Fateheh Nessa E-Jdehai, heirs of Omid Ali Bandi, Hasan Bandi, Mohammad Bandi, Mahmood Bandi, Manaz Bandi, Aazam Bandi, Mazoomeh Bandi, Majid Bandi, Fateheh Nessa E-Jdehal, deceased.

Nasrallah Saedi, Eshrat Saedi, Mohsen Saedi, and Hosein Saedi, heirs of Fareshteh Saedi and Effat Sojai, deceased.

Maryam Daryanavavdi, Mohammad Madani, Ebrahim Madani, Faisal Madani, Mansour Madani, Anemeh Madani, and Ali Madani, heirs of Abdullah Madani, deceased.

Mohamad Ahmad Kashkouli and Resa Kashkouli, heirs of

TAB 1)

So far as known to Petitioners, the corporate defendants and subsidiaries are as follows:

Computer Sciences Corporation
Harnischfeger Industries, Inc.
Varian Associates, Inc.
General Electric Company
Dart & Kraft Financial Corporation
GECC Financial Corporation
General Electric Capital Corporation

Mohamad Kashkouli, Ali Kashkouli, Sirous Kashkouli and Maryam Kashkouli, deceased.

Kaniz San Garzadeh, Mohamad Juma Ramzani, Ali Gholan Juma Ramezani, Abdul Kerim Juma Ramezani, Mahnaz Juma Ramezani, Esmaeel Juma Ramezani, Leili Juma Ramezani, Farah Juma Ramezani, Adel Juma Ramezani, Halinih Juma Remazani, and Masoumeh Juma Ramezani, heirs of Gholam Juma Ramezani, deceased.

Adnan Jamei and Nassir Jamei, heirs of Hoda Kahatib, Massoud Jamei, Alla Jamei and Soda Jamei, deceased.

Hassan Khabor and Ali Khabor, heirs of Ameneh Khabor, Mashallah Khabor, Moosa Khabor, Morteza Khabor, Hadi Khabor and Mohammad Khabor, deceased.

Zeynab Mohammad Ali, Mohammad Saleh Ahmad and Ebrahim Saleh Ahmad, heirs of Saleh Ahmad, deceased.

Lt. Col. Abdul Aziz Hohd. Abdulla, Ibraheem Abdoulrahman, Abdoulah Abdoulrahman, Abdoulghader Abdoulrahman, Jamal Abdoulrahman, Kadijeh Mohamad Abdoulrahman, Abdoulraheem Mohamad Ahmad, Yagoub and Mostafa, heirs of Mohammad Abdoulah Abdoulrahman, Ayesheh Abdoulraheem Mohammad, Ahmad Mohamad Abdoulah Abdoulrahman, Khalid Mohamad Abdoulah Abdoulrahman, Vahideh Mohamad Abdoulah Abdoulrahman and Mona Mohamad Abdoulah Abdoulrahman, deceased.

Ali Moradipour, Mohammad Karimina and Darkhatoon Botshekan, heirs of Rouzkhatoon Sabeginegad and Mariam Moradipour, deceased.

General Electric Capital Canada, Inc
General Electric Credit Intl., N.V
General Electric Financial Services, Inc
General Electric Overseas Capital Corp.
Montgomery Ward Credit Corporation
Montgomery Ward & Co., Incorporated
CAMCO, Inc. (Canada)

TABLE OF CONTENTS
(Rule 14.1.(c))

Page

(a) QUESTIONS PRESENTED FOR REVIEW... *iii*

(b) LIST OF ALL PARTIES TO THE PROCEEDING UNDER REVIEW..... *iv*

(c) TABLE OF AUTHORITIES ..... *xi*

(d) REPORTS OF OPINIONS BELOW..... 1

(e) GROUNDS FOR CERTIORARI JURISDICTION 1

(f) CONSTITUTIONAL PROVISIONS AND STATUTES..... 1

(g) STATEMENT OF THE CASE 3

District Court Opinion 6

(i) FEDERAL JURISDICTION IN THE FIRST INSTANCE 11

(j) ARGUMENT 12

A. War and Peace 12

B. Litigation Versus Iran 18

C. War Requires At Least Some Public Official Determination By The Executive 20

D. This Case Is A Further And Unwarranted Extension Of The *Feres* Doctrine 23

E. *Ex Gratia* Payments 23

CONCLUSION 24

(k) APPENDIX A-1

TABLE OF AUTHORITIES
(Rule 14.1.(c))

Page

Cases

American Intern Group, Inc. vs. Islamic Republic of Iran,
657 F.2d 340, 211 U.S. App.D.C. 468 19

Baker vs. Carr,
369 U.S. 186, 82 S. Ct. 691, 7 L.Ed. 663 (1962) 6

Behring International, Inc. vs. The Imperial Iranian Air Force,
699 F.2d 657 (1983) 19

F. & H.R. Farman-Farmaian Cons. Eng. v. Harza Eng.,
882 F.2d 281 (7th Cir. 1989) 20

Feres vs. United States,
340 U.S. 135, 71 S. Ct. 158, 95 L.Ed. 152 (1950) . . . 23

Giuseppi v. Walling,
144 F.2d 608, 624 (2nd Cir. 1944) 24

Hamilton vs. Kentucky Distilleries Co.,
251 U.S. 146, 40 S. Ct. 106, 64 L.Ed. 194 16

Lowry vs. Reagan,
676 F.Supp. 333, (D.D.C. 1987) 13, 14

Navios Corporation vs. The Ulysses II,
161 F.Supp. 932 . . . . . *18*

New York Life vs. Bennion,
158 F.2d 264 17

New York Life vs. Duram,
166 F.2d 874 16

Scheuer vs. Rhodes,
416 U.S. 232, 94 S. Ct. 1683, 40 L.Ed. 90 (1974) 6

The Paguette Habana,
175 U.S. 677, 20 S. Ct. 290, 44 L.Ed. 320 (1900) . . 6, 14

d x United States vs. Johnson,
481 U.S. 681, 107 S. Ct. 2063, 95 L.Ed.2d 648 23

Statutes

16 U.S.C. 761 11

28 U.S.C. 1291 11

28 U.S.C. 1332 11

28 U.S.C. 1346(c) 11

28 U.S.C. 1350 . . . . . 8, 11

28 U.S.C. 2671 . . . . . 6, 11

28 U.S.C. 2674 . . . . . 2, 12

28 U.S.C. 2680 . . . . . 2, 24

28 U.S.C. 2680(j) 1, 2, 6, 7, 8, 12, 13, 15, 21, 23, 24

46 U.S.C. 764 11

46 U.S.C. 781 . . . . . 2, 15

50 U.S.C. 1601-1651 22

Alien Tort Act 8

Federal Rules of Civil Procedure 54(a) 11

Federal Tort Claims Act 8, 17, 24

International Emergency Economic Powers Act 19, 22

National Emergency Act 22

Public Vessels Act 8, 15

U.S. Constitution, Article I 1, 22

U.S. Constitution, Article II 2

Treaties

International Civil Aviation Organization 8

Executive Orders

12613 of Oct. 19, 1987 16

12744 of Jan. 21, 1991 . . . . . 13, 21

12750 of Feb. 14, 1991 21

Article

Yale L. J. 434, 548
"The Federal Tort Claims Act" 24

REPORTS OF OPINIONS BELOW
(Rule 14.1.(d))

The published opinion of the court below 976 F.2d 1328 (9th Cir. 1992) is set out in Appendix Sec. 1, Page A-4.

The unpublished opinion of the United States District Court for the Northern District of California is set out in Appendix Sec. 2, Page A-30.

The denial of the Petition for Rehearing and Suggestion for Hearing En Banc is set out in Appendix Sec. 3, Page A-36.

GROUNDS FOR CERTIORARI JURISDICTION
(Rule 14.1.(e))

(i) The Decision of the court below at 976 F.2d 1328 (9th Cir. 1992) was decided on October 8, 1992;

(ii) The Petition for Rehearing and suggestion for Hearing En Banc was denied on December 16, 1992 (Appendix Sec. 2); (iii) Review herein is discretionary under Rule 10, in reference to Federal Statute 28 U.S.C. 2680(j).

CONSTITUTIONAL PROVISIONS AND STATUTES
(Rule 14.1.(f))

1) U. S. Constitution, Article I, Section 8, Powers of Congress:

"[11.] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

2) U. S. Constitution, Article II, Section 2, Commander-in-Chief, Pardons, Treaties, Appointment of Officers:

"[1.] The President shall be Commander in Chief of the Army and Navy of the United States."

3) 28 U.S.C. 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

4) 28 U.S.C. 2680: Exceptions:

"(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard during time of war."

5) 46 U.S.C. 781:

"§781. Libel in admiralty against or impleader of United States

A libel in personam in admiralty may be brought against the United States or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, that the cause of action arose after the 6th day of April, 1920."

STATEMENT OF THE CASE
(Rule 14.1.(g))

This is a wrongful death negligence action seeking only monetary damages for the benefit of dependents and family members of international airline travelers from India, Italy, Pakistan, United Arab Emirates, Yugoslavia, and Iran. One daughter of the pilot in command of Iran Air Flight 655 was born in Norman, Oklahoma, and is a United States citizen.

Flight 655 was, on July 3, 1988, a regularly scheduled, twice a week flight, across the Persian Gulf from Bandar Abbas in the Islamic Republic of Iran to Dubai in the United Arab Emirates. At this time the Persian Gulf was a busy area of commercial activity and Dubai is a major air traffic hub for the region with inter- connections to India, Pakistan and Europe.

Many passengers were ticketed through Dubai on this regularly scheduled international flight and, for example, Mr. Anthony Caputo, was on the flight as a scheduled leg home from engineering work to vacation with his wife and two

children near Milan, Italy. Captain Munir Arshad was in the Pakistani Foreign Service and was on board with his wife and two young daughters returning to Pakistan via Dubai. Dr. Urfee and his wife and three children were ticketed through Dubai to India.

The opinion below refers to these international passengers as "members of the enemy military or civilian populations" and partially justifies their death on this ground.[2]

Petitioners urge that these international civilian air travelers on a scheduled civilian airbus on an airway were not enemies or "targets" as set out in the opinion below, and there is absolutely no basis for concluding that we were at war with India, Italy, Pakistan, the United Arab Emirates or Iran. Dislike of the current Iranian government is shared by many, but should not be the basis for rewriting a 46 year old statutory provision. Plaintiffs are not associated with the Iranian government and only became "enemies" by buying tickets on an airline chartered by an unpopular government.

On Sunday morning, July 3, 1988, Flight 655 departed normally under routine radio procedures on International Airway A59, with the aircraft climbing en route. The International Civil Aviation Organization investigation, in which the United States actively participated, concluded

---

2 976 F.2d 1328 at Page 1335 (also 1337) "no duty of reasonable care is owed to those against whom force is directed as a result of authorized military actions," Page 1338:

> "Congress probably did not intend that the government be liable for the failure to exercise reasonable care for the safety of those against whom our armed forces are deployed in combat, whether war has been declared or not."

(Appendix, Section 4, A-47, 52) that there was no indication at Bandar Abbas of any special or combat activities or "zone" on the morning of July 3, 1988.

The aircraft, contrary to the misapprehension by the court below, did not fail to communicate its civilian status to the crew of the Vincennes.[3]

Iran Air Flight 655 was in radio communication with Bandar Abbas Air Field and with Air Route Traffic Control Center, and was climbing normally in the approximate middle of Airway A-59 when it was struck at an approximate altitude of 13,500 feet with a guided missile from the U.S.S. Vincennes, a public vessel of the United States.

Over three hundred (300) passengers and crew perished, including 90 children. These human beings were not targets or enemies, but were innocent and unintended victims of negligent identification of an international civilian flight. If the aircraft were owned by TWA or BOAC, clearly compensation would have been provided for the families of the passengers without litigation. The airframe was owned by a nation in bad grace with the American press and public, and this is the dominant factor in this posture of the case.

No meaningful warnings were given to the aircraft basically because the U.S.S. Vincennes was unfortunately not in radio communication with the civilian air network. The

---

3 Opinion 976 F.2d 1328 at Page 1337 "was flying in the area of a combat zone and failed to communicate its civilian status to the crew of the Vincennes." See Appendix Section 4, ICAO report, Appendix Pages A-49, 50, 51, 55, 68. The aircraft was transmitting Code III on its transponder and this civilian airliner radio code was clearly recognized by the crew of the USS Sides.

U.S.S. Vincennes transmitted a series of messages on UHF military guard frequency, 243MHz, a radio frequency not available on international airliners. A few incomprehensible transmissions were made by the U.S.S. Vincennes on 121.6MHz, the international guard frequency. One meaningful transmission was made by the U.S.S. Sides a minute before the airbus was destroyed while climbing en route at 13,500 feet.

District Court Decision

The District Court dismissed the entire case on the ground that this was a political question citing *Baker vs. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed. 663 (1962), and other cases in that line of authority.

The majority of the Ninth Circuit Court panel declined to follow the District Court in this respect and Circuit Judge Reinhardt set out (*supra* Page 1331) that actions for monetary damages for death or injury by U.S. Military, Naval or Coast Guard personnel are within the competency of the Judiciary, citing *Scheuer vs. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L.Ed. 90 (1974) and *The Paguete Habana*, 175 U.S. 677, 20 S. Ct. 290, 44 L.Ed. 320 (1900).

The Ninth Circuit Panel, however, affirmed dismissal on a new unbriefed and unargued ground. The Ninth Circuit determined that 28 U.S.C. 2680(j) which sets out

> "2680. Exceptions.
>
> The provisions of this chapter [28 USCS §§2671 et seq.] and section 1346(b) of this title shall not apply

to--

> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

apply to this case since on July 3, 1988 the United States of America was in effect at war with the Islamic Republic of Iran.

The court below concluded that even though there had been no Congressional Declaration of War under Article I, Section 8, and even though there were no Executive Orders concerning military activity against Iran, and even though the United States Government, as a defendant in the lawsuit, had never claimed in this case that there was a state of war, nevertheless the court could conclude that "time of war" existed for purposes of 2680(j) (Opinion, Page 12).[4]

The court below based its conclusion upon the apparent fact that earlier in the morning of July 3, 1988, there had been gun fire exchanged between the U.S.S. Vincennes and some Iranian Patrol Boats, and the fact that a few spent bullets may actually have impacted and damaged the paint of the U.S.S. Vincennes (Appendix Sec. 4, Page A-64).

Iran and Iraq had been involved in an extended war and the United States Navy, Appendix Sec. 4, Page A-45 (ICAO Fact Finding Investigation), was in the Persian Gulf for the purpose of protecting commerce on the high seas, a

---

[4] Petitioners represent that in none of the briefs filed below has the United States Executive ever claimed that we were at war with Iran. This concept was developed by the court below on its own without the assistance from the defendant United States.

legitimate and traditional naval activity.

Petitioners do not question the propriety under international or national law of the United States Navy's presence to protect commerce in the Persian Gulf, and when fired upon any military vessel is entitled to return fire as a basic matter of common sense and international law.

Petitioners urge, however, that under the basic law of negligence adopted and applied to U.S. Naval vessels by the Public Vessels Act and by the Federal Tort Claims Act, U.S. Naval vessels have a duty to make reasonable efforts to identify civilian commerce, both on the surface, in the water, and in the air, and a duty to avoid needless destruction of civilian aircraft and human life.

The court below extended the exceptions of 28 U.S.C. 2680(j) to the Public Vessels Act which had been enacted some 26 years earlier in 1920, and concluded that actions under the Public Vessels Act were barred in that a "time of war" existed so that public vessels of the United States were immune from legal action.

The court further extended the "time of war" exception of 28 U.S.C. 2680(j) to civilian contractors who designed and built the Aegis System and the identification friend or foe features of the system to provide "combat activity in the time of war" immunity to the civilian contractors.

The court held that treaty obligations under the International Convention on Civil Aviation did not waive sovereign immunity and that the Alien Tort Act, 28 U.S.C. 1350 did not waive sovereign immunity, and that the foreign nationals of friendly nations on board the international air

flight had no remedy against the United States for death resulting from negligence of the crew of a public vessel of the United States because of war time considerations.

Petitioners respectfully urge that carrying out a police action to protect commerce is fundamentally different than engaging in a war and that the expansion of immunity herein is not justified by the words of the code section which specifically refer to combat activities of the military or naval forces or the Coast Guard during "time of war". The court below has amended the 46 year old statute to delete "time of war" entirely.

Petitioners submit that one fundamental misconception of the panel below was that the Persian Gulf was one giant area of military activity. This in fact was not the situation.

One highly significant factual account by an eye witness, which is part of the record, is the account by Commander Carlson, the commanding officer of the U.S.S. Sides, (FFG-14), which was on the scene during the exchange of fire with the Iranian Patrol Boats and the airline misidentification.

In *Proceedings*, Commander Carlson sets out, among other matters (Appendix Sec. 9, Page A-78):

> "They essentially advised that I read the message traffic, absorb the contents, then go on deck and look around. Their message was clearly aimed at emphasizing the fact that -- war or no war -- life in the Gulf went on: fishermen fished; commerce continued; airliners flew. Caution was required, but the mission was to reduce tension when possible,

> to show by our presence that we were resolved to protect U.S. interests, and to demonstrate prejudice against any unnecessary conflict."

The significant point is that the mission of the United States Navy in the Persian Gulf was not war. It was peace. This was a police operation and not an attack on any country.

Commander Carlson further sets out on the following page (Appendix Sec. 9, Page A-78):

> "Nothing is served by saying otherwise. No gain is made by ducking the issues. No profit has come from the pathetic post incident attempts to place the blame on the victims. View if as you will, Iran Air Flight 655 was shot down for no good reason."

In the final paragraph of his article, Commander Carlson sets out that the U.S. Navy was not at war, to the best of his knowledge as a significant participant in the event of July 3, 1988. Commander Carlson sets out (Appendix Sec. 9, Page A-79):

> "The main lesson here is not, and should not be, that 'wars beget accidents.' This is axiomatic, but we were not at war. Above all, we must not concede that 'accidents--terrible accidents like this one--are unavoidable.' That is a cop-out. This tragedy was avoidable, and we must learn from it."

Petitioners submit that it is clear that the United States was not at war with the Islamic Republic of Iran on July 3, 1988, or at any other time, and that the tragic accident

resulted from negligent misidentification of a civilian airliner. The navy did not need protection from the unarmed airbus and it seems clear that defendants owed a duty of ordinary care to these civilian passengers from many nations.

FEDERAL JURISDICTION IN THE FIRST INSTANCE (Rule 14.1.(i))

In respect to the four contractor defendants, Varian Associates, General Electric Company, Harnischfeger Industries (Syscon) and Computer Sciences Corporation, jurisdiction is based upon 28 U.S.C. 1332 (1) and (2) and upon the provisions of 16 U.S.C. 761 *et seq.*, including 46 U.S.C. 764 and 28 U.S.C. 1350.

In respect to the defendant United States, jurisdiction is based upon 28 U.S.C. 1350, 28 U.S.C. 1346(c), 28 U.S.C. 2671 *et seq.*

The Ninth Circuit Court of Appeal had appellate jurisdiction over this case following the final judgment of District Court pursuant to 28 U.S.C. 1291 and Federal Rules of Civil Procedure 54(a).

In the three cases consolidated below (C-89-2388 TEH, C-89-2872 and C-90-0337) the Order and Judgment finally dismissing the actions was filed June 11, 1990. Notice of Appeal was filed June 22, 1990. The order dismissing C-90-1716 was filed July 19, 1990. Notice of Appeal was filed July 26, 1990. The appeal was argued and submitted on February 11, 1992 and the Opinion with the Ninth Circuit affirming dismissal of all cases and claims was filed October 8, 1992. Petition for Rehearing and suggestions for Rehearing

En Banc were filed on October 20, 1992. The petitions were denied on December 16, 1992.

ARGUMENT
(Rule 14.1.(j))

A. War and Peace

The Circuit Court of Appeals below has decided a significant question of federal law which has not been, but should be settled by this court. Petitioners submit that the interpretation of 28 U.S.C. 2680(j) to exclude "in time of war" from the statute, or alternatively to determine that a state of war existed between the United States of America and the Islamic Republic of Iran on July 3, 1988, is in conflict with all prior decisions of United States Courts dealing with this issue and in conflict with fundamental international law.

No prior case since the enactment of 28 U.S.C. 2674 *et seq.* in 1946 has interpreted 28 U.S.C. 2680(j) to exclude "in time of war" from the exemption and no case decided by any court in the United States has ever held that the United States was at war without some official determination of some type by either the Executive or the Legislative Branch.

For example, the war against Iraq was authorized by Public Law 102-1 (H.J. Res. 77) January 14, 1991, and specifically authorized use of force against Iraq to remove the military forces of Iraq from Kuwait.

Section 2(c)(1) specifically sets out that:

> "The congress declares that this section is intended to constitute specific statutory

> authorization within the meaning of Section 5(b) of the War Powers Resolution." (Appendix Sec. 10)

Executive Order 12744, January 21, 1991, specifically designated the Arabian Peninsula as a combat zone.

In respect to Iran there was no invasion and there was also no Executive Order or any official pronouncement of the Executive opening any hostilities with Iran. The United States Navy was sent on a peace keeping mission to Persian Gulf to protect commerce. This is peace time police activity, not a war against Iran.

No federal court has ever decided that civilian contractors have special war time immunity in a situation which does not involve a state of war as announced by any branch of either the United States government or foreign government involved.

The court below set out at Page 1335:

> "There can be no doubt that during the 'tanker war' a 'time of war' existed."

That war however was between Iran and Iraq and "time of war" in 28 U.S.C. 2680(j) must mean a war involving the United States. Some country is always at war somewhere on the planet. The United States was neutral in the Iran-Iraq war.

In *Lowry v. Reagan*, 676 F.Supp. 333 (D.D.C. 1987) Footnote 13, sets out:

"13. Iran and Iraq have been in a state of war since September, 1980. See Declaration of Richard L. Armitage at Par. 12. The United States is neutral in this war. C. Weinberger, A Report to the Congress on security arrangements in the Persian Gulf (June 15, 1987)."

The attack on the U.S.S. Stark was by Iraq, not Iran. Iraq aircraft hit the U.S.S. Stark with an Exocet missile almost sinking the ship and killing 38 crew members. Does this mean that we were at war with Iraq? None in the Executive or Legislative of our country so believed, and Iraq paid compensation at a substantial level to the families of U.S. military personnel who died. It seems to petitioners that the United States Government should do no less for the airbus passengers.

Before the decision below, the distinction between war and peace under international law had been clearly recognized by the United States Courts. Even in war, there are or were rules of military care and propriety.

In *The Paquete Habana*, 175 U.S. 677 (1900) there had been a formal Declaration of War by the Congress of the United States against Spain. The U.S. Navy seized the Paquete Habana and the Lola with cargoes of fish. The crew had no knowledge of the blockade or the existence of the war. No arms or ammunition were on board. The Supreme Court held that the seizure was improper even though it occurred during time of war since the vessels were engaged in civilian pursuits even though they were owned by the "enemy" citizens. The Supreme Court of the United States viewed the matter on a Writ of Certiorari and after considering French

and English International Law, as well as American cases, held that civilian commercial traffic, even involving citizens of a country against whom war has been formally declared are exempt from capture setting out at Page 703:

> "In time of war the freedom of fishing is respected by belligerents; fishing boats are considered as neutral; in law, as in principle, they are not subject either to capture or to confiscation."

Petitioners submit that 28 U.S.C. 2680(j) should be interpreted, especially if applied to the Public Vessel Act 46 U.S.C. 781, in the light of existing law at the time of its enactment in 1946.

The court below holds now that international civil aviation in an area in which the United States is engaged in policing activities need not be respected with ordinary care so it can be destroyed by a U.S. Navy vessel without inquiry.

One manner of phrasing the issue in this petition is to ask whether or not the Congress, in respect to 28 U.S.C. 2680(j), intended to absolve U.S. military forces engaged in police actions of any duty of ordinary care toward non belligerents, including civilian commercial international aviation or civilian commerce on the high seas.[5]

The fundamental concept which petitioners respectfully urge is that "war" is more than a police action skirmish and certainly more than the exchange of fire between U.S.S. Vincennes and the Iranian Patrol Boats. Incidentally it

---

5 In briefing below the United States admitted this duty. Brief of Appellee United States, Page 26.

should be noted that no tankers were on the scene in any manner on July 3, 1988.

Under International Law and the law of the United States prior to the decision below, discharge of weapons by the United States Military against forces of another country does not create a war. War is a political act which under all prior cases needed to be determined either by the Legislative or the Executive under an official pronouncement of some nature. In *New York Life vs. Duram*, 166 F.2d 874, the court summarized prior law.

> "Of course, courts do not declare war or make peace. The existence of war and restoration of peace are determined solely by the political departments of our Government, and such determinations are conclusively binding upon the Courts in all matters of state or public concern, and war having been declared, its existence must be recognized by the Courts until peace is proclaimed, although actual warfare may have ceased. *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 40 S. Ct. 106, 64 L.Ed. 194..."

Some public act has always been required for the courts of the United States to determine that a state of war exists. In the case at bar, there was no pronouncement of the Executive of any kind. The Executive Orders during the time period have been reviewed and no Executive Order suggests war against Iran in July of 1988. The closest is Executive Order 12613 of October 29, 1987, prohibiting imports from Iran. Should this be considered the constitutional equivalent of war? No official act of the Executive sets out that there was a state of hostility with Iran, war or otherwise.

The United States Government is a party to this litigation. Even in this case the United States has not asserted that a state of war existed with Iran. This concept was created exclusively by the court below without any claim by the Executive as to the existence of a state of war with Iran.

Obviously under some circumstances there is no official declaration of the government because events precede official government action. For example on December 7, 1941 the Japanese attacked Pearl Harbor without declarations or resolutions by either the Japanese or the American Government. In *New York Life Co. vs. Bennion*, 158 F.2d the court held that war existed, setting out at Page 264:

> "[2] When one sovereign nation attacks another with premeditated and deliberate intent to wage war against it, and that nation resists the attacks with all the force at its command, we have war in the grim sense of reality. It is war in the only sense that men know and understand it."

A full scale national attack and invasion of another country is war. This is not the case at bar. All we have is a minor skirmish between vessels lasting for a brief period. No tankers were called for assistance. There had been prior incidents, none resulting in war, or any official acts by either country.

Petitioners respectfully urge that at the time Congress enacted the Federal Torts Claims Act it was clearly the law that determination of "war" required some official act of government. A border guard skirmish is not a war. Petitioner respectfully urges that Congressional intent in the enactment of the FTCA should be viewed in light of existing law at the

time of its enactment rather than a novel and creative interpretation 46 years later.

The court below viewed the issue of whether or not border confrontation is war as a novel question. In fact the issue is not novel, only the court's conclusion. For example, in *Navios Corporation v. The Ulysses II*, 161 F.Supp. 932, the court at Page 938 discusses the same issue as follows:

> "It is evident that we are confronted with a choice between regarding 'war' as primarily physical force or primarily legal status. Popularly, of course, the term war is given a very broad meaning[6]. In international law, however, the experts are inclined to equate 'war' with 'state of war'. Thus, if one nation declares war against another, a state of war may exist before any force has been employed. On the other hand, force may be employed by one nation against another and yet no state of war may arise."

In *Navios, supra*, Footnote 6 reviewed dictionaries in the 1958 vintage of the case, including Webster's New International Second and the Oxford Dictionary. Dictionary definitions then and now define war as a formal pronouncement by a sovereign state determining a state of war (*Navios Corporation vs. The Ulysses II, supra*, Footnote 6, at Page 939. The court decision below alters the English Language as well as the code section to achieve a desired result.

B. Litigation Versus Iran

Many American companies are, even at the present

time, still involved in litigation with Iran arising from the 1979 revolution and the expropriation of property and cancellation of contracts.

For example in *American Intern Group, Inc. vs. Islamic Republic of Iran*, 657 F.2d 340, 211 U.S. App. D.C. 468, the court upheld the Executive Order authorized by the *International Emergency Economic Powers Act* and the agreement with the Islamic Republic establishing the Iranian Assets Arbitration.

A large number of cases versus various Iranian governmental and civilian entities have passed through the federal courts in the decade of the '80s. For example in *Behring International, Inc. vs. The Imperial Iranian Air Force*, 699 F.2d 657 (1983) (at page 660) the court upheld the Executive Agreement of January 19, 1991 between the United States and the Islamic Republic of Iran settling the hostage crisis, (Algerian Declarations) and nullifying attachments and judgments obtained in American courts and authorizing resolution of claims through the Iran-United States Claims Tribunal created by Executive Agreement.

The Iran-United States Claims Tribunal continues to operate through the present time and billions of dollars of claims have been adjudicated and are still now in the process of adjudication in the tribunal.

How can it realistically be said that the United States, in 1988, was, or presumably now is, in a state of war with Iran. The United States in July of 1988 was engaged with Iran in the carrying out of resolution of claims through the Iran-United States Claims Tribunal. Dozens of attorneys and judges during the week before and after July 3, 1988 were meeting to resolve expropriation claims between American

companies and governmental entities of Iran. None of these people, either the judges or the attorneys, knew at that time that the United States was at war with Iran. Only the Ninth Circuit had this information. Other circuits did not share this knowledge.

For example in the case of *F. & H.R. Farman-Farmaian Cons. Eng. v. Harza Eng,* 882 F.2d 281 (7th Cir. 1989). The 7th Circuit held, among other matters, that the seizure of *Farman-Farmaian* occurred on Iranian soil and should be upheld by the Courts of the United States.

At Page 287, *supra*, the court discussed the implications of not recognizing the Iranian Government's seizure and pointed out that this would be a slap in the face of the official government of Iran and should, by all means, be avoided.

If the Seventh Circuit had known that we were at war with Iran, then the decision might have been otherwise. We should not mind a slap in the face of an enemy.

The substantive point is that the existence of an on-going claims tribunal resolving issues between the countries, and on-going litigation resolving issues between the countries, and the absence of any judicial knowledge outside of the Ninth Circuit that we were at war with Iran argues against the conclusion of the court below.

C. War Requires At Least Some Public Official Determination By The Executive

The court below correctly points out that in some war time situations there has been no formal declaration of war by Congress.

However, in each of the cases listed by the court below, (at Page 1334), there has been an official public pronouncement by the Executive at least as to the existence of open hostilities.

The Ninth Circuit sets out:

> "Perhaps more surprising there was no formal declaration of war prior to the 'liberation' of Kuwait or the invasion of Iraq."

The invasion of Iraq was supported by a number of Executive Orders specifically and publicly authorizing the use of military force, including Executive Orders 12744 of January 21, 1991, and 12750 of February 14, 1991. In addition a joint resolution of the Congress of the United States enacted the "*Authorization For Use Of Military Force Against Iraq*" (Appendix Section 10).

Nothing. Absolutely nothing of any similar nature reports any official declaration for use of armed force against Iran.

The Korean War was entered into under the auspices of the United Nations and the formal position of the United States was as the enforcer of the United Nations Resolution. Church: *History and the Constitution Role of Courts*, 1990 Wisconsin Law Review 1071.

The Korean War was proclaimed as a national emergency by the President on December 16, 1950 by 1950 Proc. No. 2914, 15 Fed. Reg. 9029.

It should be noted that the Congress specifically provided that Subsection (j) of 28 U.S.C. 2680 should come into full force and effect and should continue in force until six months after the termination of the national emergency proclaimed by the President. 67 Stat. 132, Joint Resolution, June 30, 1953, Ch. 172. Both the Executive and Congress participated in the national emergency determination, the constitutional equivalent to a formal declaration of war.

The War in Vietnam, in terms of Congressional action, was initiated with the Tonkin Gulf Resolution, Public Law 88-408, 78 Stat. 384, and followed by a number of Executive orders and Congressional decisions relative to the Vietnam conflict.

Panama was not invaded based upon the decision of a local commander to engage in combat activities in that country. Panama was invaded under direct orders of the Executive. Initially, President Reagan declared a national emergency under the National Emergency Act, 50 U.S.C. 1601-1651 (1988) and under the International Emergency Economic Powers Act on April 8, 1988. President Bush ordered "Operation Just Cause", the code name for the Panamanian invasion on December 20, 1989.

The invasion of Panama was initiated by an official act by the Executive on December 20, 1989 after Panama had, on December 15, 1989, formally declared that a "state of war" existed between Panama and the United States. (*U.S. v. Noriega* 746 F.Supp. 1506 (S.D. Fla. 1990) at page 1511).

The point is not to argue whether under Article I of the Constitution only Congress has the power to declare war. The issue is whether or not a local commander by shooting at

another nation's military forces in self defense or otherwise can create a war without sanction by either the Executive or Congress. Can war be declared without the approval of either the Executive or Congress by the commander of a military unit? The panel has answered in the affirmative and this decision should be analyzed.

D. This Case Is A Further And Unwarranted Extension Of The *Feres* Doctrine

In *Feres vs. United States*, 340 U.S. 135, 95 L.Ed. 152, 71 S. Ct. 158 (1950), the court held that military personnel on active duty, combat or non-combat, war or peace, are excluded by 28 U.S.C. 2680(j) from claims against the United States.

The creativity of the *Feres* court is clear. Nevertheless, the doctrine has been upheld for policy reasons and because of its antiquity, most recently in *United States vs. Johnson*, 481 U.S. 681, 95 L.Ed. 2d 648, 107 S. Ct. 2063 (1987).

Petitioners respectfully urge that the present decision extends the immunity of *Feres* beyond U.S. service personnel to include foreign civilians, and that this extension is unwarranted by the wording of the statute even if the *Feres* doctrine is to be a permanent part of American law.

E. *Ex Gratia* Payments

The court below believed that family survivors of passengers have received *ex gratia* payments. Some have, but very few, about ten (10%) percent and in very modest amounts. *Ex gratia* payments were promised in 1988, but most of the plaintiffs herein have received nothing.

CONCLUSION

The court below in justification of its rewriting of 28 U.S.C. 2680(j) quotes Justice Learned Land (*supra*, P. 1333) to the effect that "there is no surer way to misread a document than to read it literally", but omits his statement at the top of the same page which sets out:

> "Even so, I should have had the utmost compunction in disregarding the explicit language with which the section begins were it not for its legislative history." *Giuseppi v. Walling*, 144 F.2d 608, 624 (2nd Cir. 1944)

In the temporal context of the legislative history of 28 U.S.C. 2680, the reference to "war" a year after the ending World War II is clear. The term "during time of war" was in the original draft and the separate and distinct reduction in scope of "time of war" to also limit the war exception to "combatant" was added by committee amendment. *The Federal Tort Claims Act*, Yale L. J. 534, 548, N. 99 (1947).

Both requirements are clearly in the statute and legislative history only reinforces the clear and unambiguous double requirements.

Petitioners respectfully urge that the literal words of the code section should not be altered because of the desire to shield the United States government from claims by some citizens of a disfavored country. The American public are not pleased with Iran from the hostage crisis of 1979 through the present time. However, many of the passengers killed were not Iranian citizens, and most of the plaintiffs in this case are not, in fact, subjects of the government of Iran in any true

sense and most live in the United Arab Emirates. Some are residents of Iran.

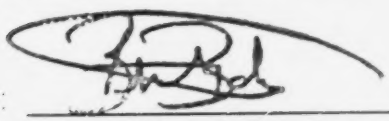
The expansion of war to include any skirmish is a rejection of the rule of law as it has progressed in the world over the last three centuries. The substitution of court proceedings and compensation for wrongful death goes back to the beginnings of the law and should be expanded in modern times. Petitioners do not ask for expansion, but merely for a literal proper reading of the code Section.

Petitioners ask for a resolution of their claims based on truth and justice and the Constitution and Laws of the United States. The citizens of the nations of the world have faith in the fairness and justice of the American legal system as a paradigm of the international rule of law.

Dated: March 15, 1993

Respectfully submitted,

BRUCE ALBION BAILEY
A PROFESSIONAL CORPORATION
1800 Trousdale Drive
Burlingame, CA 94010
Telephone: (415) 692-2400
Facsimile: (415) 692-0618

By: 

Bruce Albion Bailey, Esq.
Attorney for Petitioners

Case Number

IN THE

United States Supreme Court

MITRA KOOHI, IMAN KOOHI, minor daughter;
KOSAR KOOHI, minor daughter; HASSAN ALMASSI;
IRAN AIR FLIGHT 655,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA; UNITED STATES
DEPARTMENT OF NAVY,
Defendants-Appellees,

ELIZABETH H. BAILEY, as the personal
representative, et al.,
Plaintiffs-Appellants,

vs.

VARIAN ASSOCIATES, INC.; GENERAL ELECTRIC CO.; GE
AEROSPACE; RCA CORP.; HARNISCHFEGER INDUSTRIES;
SYSCON CORP.; COMPUTER SCIENCES CORPORATION;
JOHN CONNOR,
Defendants-Appellees

APPENDIX
(Rule 14(k))

This Appendix to the Petition for Writ of Certiorari filed herewith contains the following matters.

Sec. 1 (i)	Opinion Below 976 F.2d 1328 (9th Cir.) October 8, 1992	A-4
Sec. 2 (ii)	Unpublished Opinion and Order of Dismissal by the United States District Court for the Northern District of California. June 11, 1990	A-30
Sec. 3 (iii)	Order Denying Petition for Rehearing. December 16, 1992	A-36
Sec. 4 (v)	Other Appended: Excerpts from the International Civil Aviation Organization (ICAO) Report of ICAO Fact-Finding Investigation. (Record below TAB 6 Exhibit 1).	A-38
Sec. 5 (v)	Other Appended: Article 3 bis amending *The Convention on International Civil Aviation.* (Record below TAB 6 Exhibit 26A)	A-73
Sec. 6 (v)	Other Appended: Excerpts from Petitioners' complaint in C-90-0337 TEH. (Record below TAB 2)	A-74

Sec. 7 (v)	Other Appended: Excerpts from Petitioners' First Amended Complaint in C-89-2388 TEH. (Record below TAB 1.)	A-75
Sec. 8 (v)	Other Appended: Excerpts from statement by Legal Advisor of United States Department of State. (Record below TAB 4 Exhibit E.)	A-76
Sec. 9 (v)	Other Appended: Excerpts from eye witness account by Commander David R. Carlson, Commanding Officer of USS Sides (FFG-14) from *Proceedings*, Sept., 1989. (Record below TAB 6 Exhibit 2.)	A-77
Sec. 10 (v)	"Authorization for Use of Military Force Against Iraq" *Public Law 102-1* (H.J. Res. 77) January 14, 1991	A-80

Mitra KOOHI; Iman Koohi, minor daughter; Kosar Koohi, minor daughter; Hassan Almassi; Iran Air Flight 655, Plaintiffs-Appellants,

v.

UNITED STATES of America; United States Department of Navy, Defendants-Appellees.

Elizabeth H. BAILEY, as the personal representative, et al., Plaintiffs-Appellants.

v.

VARIAN ASSOCIATES, INC.; General Electric Co.; GE Aerospace; RCA Corp.; Harnischfeger Industries; Syscon Corp.; Computer Sciences Corporation; John Connor, Defendants-Appellees.

Nos. 90-16107, 90-16159.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 11, 1992

Decided Oct. 8, 1992.

Heirs of some of deceased passengers and crew of civilian aircraft shot down by United States warship sued the United States and defense contractors. Suits were dismissed by the United States District Court for the Northern District of California, Thelton E. Henderson, Chief Judge, and plaintiffs appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) suit was justiciable; (2) claim under

Federal Tort Claims Act (FTCA) was barred by exception for combatant activities in time of war, even though there was no formal declaration of war in connection with the "tanker war" during iran-Iraq conflict; (3) similar exception applied under the Public Vessels Act; and (4) action against the defense contractors was preempted by federal law and was precluded where imposition of liability would produce same effect sought to be avoided by the FTCA exception.

Affirmed.

Kleinfeld, Circuit Judge, filed a concurring opinion.

1. Constitutional Law 68(1)

Suit against the United States arising out of shooting down of a civilian aircraft by United States warship was justiciable and not precluded by "political question" doctrine, even though challenged conduct took place as part of authorized military operation, particularly since plaintiffs sough only damages for their injuries. 28 U.S.C.A. §§ 1333, 1350; Death on the High Seas Act, § 1 et seq., 46 App.U.S.C.A. § 761 et seq.; Suites in Admiralty Act, § 1 et seq., 46 App.U.S.C.A. § 741 et seq.

2. Constitutional Law 68(1)

"Political question doctrine serves to prevent federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch, and determination of whether lawsuit raises political question depends on analysis of the question posed in terms of the history of its management by political branches, of its susceptibility in light of its nature and posture of the specific case, and of the

possible consequences of judicial action.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law 68(1)

Political question doctrine does not preclude federal courts from reviewing military decisions, particularly those which cause injury to civilians, and this is true in time of war as well as in time of peace, and with respect to claims by enemy civilians as well as by Americans.

4. United States 125(3)

As a general matter, federal courts may not entertain action against the federal government without its consent.

5. United States 125(9,10)

Suits in Admiralty Act constitutes a waiver of sovereign immunity, but Alien Tort Act, International Civil Aviation Organization Convention, and Death on the High Seas Act do not. 28 U.S.C.A. §§ 1333, 1350; Death on the High Seas Act, § 1 et seq., 46 App.U.S.C.A. § 761 et seq.; Suits in Admiralty Act, § 1 et seq., 46 App.U.S.C.A. § 741 et seq.

6. United States 125(10)

The Suits in Admiralty Act is not applicable to suits involving public vessels. Suits in Admiralty Act, § 1 et seq., 46 App.U.S.C.A. § et seq.

7. United States 78(11)

Claims for damages caused by the shooting down of a civilian aircraft by United States warship were within Federal Tort Claims Act (FTCA) exemption for claim arising out of combatant activities during time of war; tracking, identification and destruction of unidentified aircraft that appeared to pose threat to warship's safety constituted "combatant activities," and incident was in "time of war" though no war had been declared, where United States involvement in vicinity was result of deliberate decision to engage in hostile military activities in relation to Iran in order to protect shipping in Persian Gulf during Iran-Iraq war. 28 U.S.C.A. § 2680(j).

See publication Words and Phrases for other judicial constructions and definitions.

8. United States 78(11)

"Time of war" within Federal Tort Claims Act (FTCA) exemption does not require express declaration of war, but applies when, as a result of deliberate decision by executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation. 28 U.S.C.A. § 2680(j).

9. United States 78(11)

For purposes of Federal Tort Claims Act (FTCA) exemption for combatant activities in time of war, with respect to shooting down of civilian aircraft by United States warship, it did not matter whether incident was deliberate or result of

error, or whether the aircraft was civilian rather than military, so long as person giving the order of firing weapon did so for purposes of furthering military objectives or defending lives, property, or other interests. 28 U.S.C.A. § 2680(j).

10. United States 78(11)

Exemption for combatant activities in time of war applies to waiver of sovereign immunity under the Public Vessels Act (PVA) even though PVA, unlike the Federal Tort Claims Act (FTCA), does not expressly contain such an exemption. 28 U.S.C.A. § 2680(d,j); Public Vessels Act, § 1 et seq., 46 App.U.S.C.A. § 781 et seq.

11. Products Liability 26

Exceptions to the Federal Tort Claims Act (FTCA) may preempt common-law tort actions against defense contractors under certain circumstances. 28 U.S.C.A. §§ 1346(b), 2680(j).

12. Products Liability 26

Claims against defense contractors arising from shooting down of civilian aircraft by United States warship, alleging as a result in part of design defects in contractors' defense system leading to misidentification of the aircraft, was preempted by federal law and was precluded on ground that imposition of liability of manufacturers would create duty of care when combatant activities exception in the Federal Tort Claims Act (FTCA) was intended to insure that non exists. 28 U.S.C.A. § 2680(j).

Bruce A. Bailey, Burlingame, Cal., for plaintiffs appellants.

Jeffrey Clair, U.S. Dept. of Justice, Washington, D.C., and Matthew D. Powers, Orrick, Herrington & Sutcliffe, San Francisco, Cal., for defendants-appellees.

Robert W. Hallock, James K. Meguerian, D'Ancona & Pflaum, Chicago, Ill., for Syscon, Corp.

Appeal from the United States District Court for the Northern District of California.

Before: SCHROEDER, REINHARDT, and KLEINFELD, Circuit Judges.

REINHARDT, Circuit Judge:

The tragedy that gives rise to this lawsuit -- the shooting down of a civilian aircraft by a United States warship -- occurred in the midst of the undeclared "tanker war" that was a part of the larger hostilities between the nations of Iran and Iraq. During the tanker war, each of those nations attacked vessels carrying the other's oil. In August, 1986, Iran began to concentrate its attacks on ships calling at Kuwaiti ports, especially those flying the Kuwaiti flag. Those ships, according to Iran, were carrying Iraqi-produced cargo, primarily oil, as well as cargo destined for Iraq. Kuwait appealed to the United States for help in protecting its shipping.[1]

---

1 We note that the basic events surrounding the Iran-Iraq conflict and the "tanker war" are a matter of historical record, are supported by documentation in the district court record, and are -- to the extent that they are relevant to the outcome of the case before us -- beyond

In March of 1987, the United States announced that it would allow qualifying Kuwaiti tankers to reregister under the American flag and that the United States Navy would then provide those tankers with protection. Because at the time Kuwait was closely allied with Iraq, the decision had the effect of aiding Iraq in its war with Iran. Shortly after the March announcement, American naval forces commenced protecting ships carrying Iraqi oil and products destined for Iraq against attacks by Iranian forces. Not surprisingly, the United States soon began to engage in combat with Iranian naval vessels. We will mention only a few of the more publicized incidents. On September 21, 1987, two United States naval helicopters fired on an Iranian landing craft, disabling the craft and killing some of the crew. On October 8, Iranian gunboats fired on a United States naval helicopter; subsequently, United States naval forces destroyed one of the gunboats. On October 16, United States naval forces destroyed an Iranian oil platform. On April 14, 1988, a United States guided missile frigate struck a mine and was extensively damaged, In apparent retaliation, United States warships destroyed three Iranian platforms and sank or damaged six Iranian naval vessels.

The incident that underlies this lawsuit occurred on July 3, 1988. Early that morning, the USS Vincennes, a naval cruiser equipped with the computerized Aegis air defense system, dispatched a reconnaissance helicopter to

---

reasonable dispute. Accordingly, we may take judicial notice of them. *See* 9 Write & Miller, *Federal Practice and Procedure* § 2410 (1971 and 1992 supp.). The United States invites us also to take judicial notice of former Secretary of Defense Casper Weinberger's *A Report to the Congress on Security Arrangements in the Persian Gulf* (June 15, 1987). We decline that invitation.

investigate reported activity by Iranian gunboats. The helicopter was allegedly fired upon by antiaircraft guns. The Vincennes in turn crossed into Iranian territorial waters and fired upon the gunboats. Minutes later a civilian Iranian Airbus, Iran Air Flight 655, took off from a joint commercial-military airport at Bandar Abbas, Iran. The Vincennes was in the vicinity of the aircraft's flight path. Its crew mistook the civilian aircraft for an Iranian F-14 and shot it down over the Persian Gulf. All 290 persons aboard the Iranian Airbus died.[2]

Plaintiffs are the heirs of some of the deceased passengers and crew. They seek compensation from the United States and several private companies involved in the construction of the Aegis Air Defense System, which was deployed on the Vincennes. They assert two different types of claims against the weapons manufacturers for design defects in the Aegis system. Essentially, they contend that the defendants were, for differing reasons and to differing degrees, each responsible for the misidentification of the civilian Airbus as an F-14 and the consequent decision to shoot it down. They contend that various statutes impose

---

[2] Briefs recently filed by the Department of Justice in the International Court of Justice report that the Vincennes was in Iranian waters at the time of the incident. Certain other events preceding the downing of the Iranian civilian plane remain the subject of controversy. Official government reports state the facts in the manner described in the text. Other sources suggest that the U.S. Navy deliberately provoked the conflict with the gunboats in order to create an opportunity to destroy Iran's remaining naval forces.

The outcome of this case is not affected by the truth of these matters. The result would be the same regardless of which side precipitated the naval encounter, and regardless of the Vincennes' location when it shot down the civilian plane.

liability on the defendants. Following the district court's dismissal of their lawsuits, the plaintiffs appealed. We affirm.

Justiciability

[1,2] The defendants first contend that we may not take cognizance of the plaintiffs' action because it is not justiciable. Specifically, the defendants contend that the subject of the plaintiffs' action is a "political question" beyond the power of the federal courts. *See, generally, Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). The political question doctrine serves to prevent the federal courts from intruding unduly on certain policy choices and value judgments that are constitutionally committed to Congress or the executive branch. *See Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230, 106 S.Ct. 2860, 2866, 92 L.Ed.2d 166 (1986). The determination of whether a lawsuit raises a political question depends upon "a discriminating analysis of the question posed, in terms of the history of its management by the political branches, of its susceptibility in the light of its nature and posture of the specific case, and of the possible consequences of judicial action." *Baker*, 369 U.S. at 211-12, 82 S.Ct. at 707.

We do not believe that the plaintiffs' action should be dismissed on the basis of the political question doctrine. We note, as an initial matter, that the governmental operations are a traditional subject of damage actions in the federal courts. *See, e.g., Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S.Ct. 3741 L.Ed.2d 354 (1957) (negligence in fighting fires); *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955) (negligence in operating and maintaining a lighthouse). Thus, the federal

courts have previously allowed damage actions alleging the *negligent operation of naval vessels. See, e.g., United States v. United Continental Tuna Corp.*, 425 U.S. 164,n 181-82, 96 S.Ct. 1319, 1329, 47 L.Ed.2d 653 (1976) (holding that a suit alleging that a naval vessel negligently collided with a merchant ship may be brought against the United States if it satisfies the reciprocity requirements of the Public Vessels Act); *United States v. Lawter*, 219 F.2d 559 (5th Cir. 1955) (allowing a suit for negligence during operation of an at-sea rescue); *cf. United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 392-95 (9th Cir.) (allowing suit for aeronautic disaster arising from negligence during military training mission), *cert. dismissed*, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964). Accordingly, the fact that the plaintiffs' lawsuit involves the operation of a United States warship does not render it beyond judicial cognizance.

[3] Nor is the lawsuit rendered judicially unmanageable because the challenged conduct took place as part of an authorized military operation. The Supreme Court has made clear that the federal courts are capable of reviewing military decisions, particularly when those decisions cause injury to civilians. The controlling case is *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900). That case involved the seizure of two Spanish fishing vessels by United States naval forces engaged in a military blockade during the Spanish-American War. The Supreme Court found that the question whether the seizure of the vessels was militarily justified could be reviewed by the Court. *See id.* at 686-713, 20 S.Ct. at 294-304. The Court then held that the decision to seize the vessels was not justified by military necessity and that the vessels must be returned. *See id.* at 713-14, 20 S.Ct. at 304-305. More recently, in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), the Court allowed a civil action

alleging the unlawful operation of the national guard during the incident at Kent State, *see id.* at 247-49, 94 S.Ct. at 1692-93. These cases make clear that the claim of military necessity will not, without more, shield governmental operations from judicial review. Instead, as the Court has stated, "when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury." *Laird v. Tatum*, 408 U.S. 1, 15-16, 92 S.Ct. 2318, 2327, 33 L.Ed.2d 154 (1972). As *The Paquete Habana* demonstrates, this is true in time of war as well as in time of peace, and with respect to claims by enemy civilians as well as by Americans.

A key element in our conclusion that the plaintiffs' action is justiciable is the fact that the plaintiffs seek only damages for their injuries. Damage actions are particularly judicially manageable. By contrast, because the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions. *Compare Gilligan v. Morgan*, 413 U.S. 1, 11, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973) (refusing to take cognizance of a suit seeking judicial supervision of the operation and training of the Ohio National Guard in the wake of the Kent State shootings) *with id.* at 5, 93 S.Ct. at 2443 (suggesting that the court might allow a suit against the national guard for damages) *and Scheuer*, 416 U.S. at 247-49, 94 S.Ct. at 1692-93 (allowing such a suit). In sum, the federal courts are competent to determine both the merits of the plaintiffs' suit and the extent of the relief to which plaintiffs would be entitled.

In addition, because the plaintiffs seek only damages,

the granting of relief will not draw the federal courts into conflict with the executive branch. Damage actions are particularly intrusive. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 120-21, 102 S.Ct. 177, 1988-89, 70 L.Ed.2d 271 (1981) (Brennan, J., concurring in the judgment) ("There is little room for the `principle of comity' in actions at law where, apart from matters of administration, judicial discretion is at a minimum.") For example, while federal courts are restrained from enjoining on-going state criminal proceedings, *see Younder v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), there is no such restraint on federal damage actions arising from state criminal proceedings, *see Giulini v. Blessing*, 654 F.2d 189, 193 (2d Cir. 1981). As the Supreme Court has noted, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395, 91 S.Ct. 1999, 2004, 29 L.Ed.2d 619 (1971).

In sum, we hold that he plaintiffs' action against the United States is justiciable. The Supreme Court's review in *The Paquete Habana* of the Navy's decision to seize two enemy fishing vessels in the course of a military operation makes it clear that the fact that an action is "taken in the ordinary exercise of discretion in the conduct of war" does not put it beyond the judicial power. 175 U.S. at 715, 20 S.Ct. at 305 (Fuller, C.J., dissenting).[3] Because we have the power to entertain the plaintiffs' action, we must next

---

[3] As we find that the plaintiffs' action against the governmental authorities is justiciable under the political question doctrine, it follows a fortiori that the action against the private defendants is as well. Indeed we have found no Supreme Court or Court of Appeals decisions which have dismissed a suit brought against a private party on the basis of the political question doctrine.

determine whether Congress has authorized us to exercise it in the type of case before us.

Sovereign Immunity

[4,6] As a general matter, the federal courts may not entertain an action against the federal government without its consent. *See, e.g., United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980). The United States has consented to be sued in a number of different enactments, two of which are relevant to the instant case -- the Federal Torts Claims Act (FTCA), 28 U.S.C. § 1346(b), and the Public Vessels Act (PVA), 46 U.S.C.App. § 781 et seq.[4] We have jurisdiction over the plaintiffs' claims against the United States only if a waiver provided by the FTCA or the PVA is applicable.

[7] We conclude that neither act provides a waiver of sovereign immunity for the plaintiffs' action. The waiver of sovereign immunity enacted in the FTCA contains an explicit exception for "[a]ny claim arising out of combatant activities of the military or naval forces, or the

---

[4] The plaintiff's also bring suit under the Alien Tort Act, 28 U.S.C.App. § 761 *et seq.*, and the Suits in Admiralty Act, 46 U.S.C.App. § 741 *et seq.* Of these, however, on the Suits in Admiralty Act constitutes a waiver of sovereign immunity. *See Canadian Transport Co. v. United States,* 663 F.2d 1081, 1092 (D.C. Cir. 1980) (Alien Tort Act does not waive sovereign immunity); *Roberts v. United States,* 498 F.2d 520, 525 n. 8 (9th Cir.) (same for Death of the High Seas Act) *cert. denied,* 419 U.S. 1070, 95 S.Ct. 656, 42 L.Ed.2d 665 (1974). The Suits in Admiralty Act is not applicable to suits involving public vessels, *see United States v. United Continental Tuna Corp.* 425 U.S. 164, 169, 96 S.Ct. 1319, 1323, 47 L.Ed.2d 653 (1976), for which the Public Vessels Act was enacted. Accordingly, the two relevant statutory bases for the claims against the United States are the Federal Tort Claims Act and the Public Vessels Act.

Coast Guard, during time of war." 28 U.S.C. § 2680(j). We believe that exception applies here and that a similar exception must be implied in the PVA despite the absence of comparable statutory language.

There is one serious question with regard to the application of the FTCA's combatant activities exception to this case -- whether or not the actions of the Vincennes took place during "time of war."[5] The leading Ninth Circuit case on the matter, *Johnson v. United States*, suggests that the words of the exception "men exactly what they say" so that proper construction of all exception "does not require resort to all possible refinements of technical legal linguistics." 170 F.2d at 769. We do not find this analysis particularly helpful; as Justice Frankfurter noted, "[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 424, 431, 63 S.Ct. 409, 412, 87 L.Ed. 376 (1943) (Frankfurter J., dissenting); *see also Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453 (9th Cir. 1992) ("Statutory construction is an area in which absolutist rules do not lead to sensible or accurate results. . . Common

---

5 It is clear that the operations conducted by the Vincennes are "combatant activities." In *Johnson v. United States*, 170 F.2d. 767 (9th Cir. 1948), we stated that the term "combatant activities" includes "not only physical violence, but activities both necessary to and in direct connection with actual hostilities," *id.* at 770. The conduct of the Vincennes that forms the subject of the plaintiffs' lawsuit is that involving the tracking, identification, and destruction of unidentified aircraft that appear to pose a threat to the warship's safety. The firing of a missile in perceived self-defense in a quintessential combatant activity."). The tracking and attempted identification of an unidentified and apparently threatening aircraft is a necessary adjunct of the power of self-defense. Thus, under *Johnson*, those activities also qualify as "combatant activities."

sense not dogma is what is needed in order to explore the actual meaning of legislative enactments.")' *Giuseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (l. Hand, concurring) ("There is no surer way to misread any document than to read it literally."), aff'd, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945). Here, although the words "time of war" may mean exactly what they say, that meaning remains unclear. *See Note, The Federal Tort Claims Act*, 56 Yale L.J. 534, 548 n. 99 (1947) (suggesting that the term "time of war was recognized to be uncertain at the time of the enactment of the statute and that the phrase "combatant activities" was included in order to help shape the content of the exception).

[8] In *Johnson*, we declined to construe the term "time of war." *See* 170 F.2d at 770. Here, we must do so; we employ the normal tools of our trade -- reason and judgment. While our task is made considerably more difficult by the absence of legislative history, *see Johnson v. United Sates*, 170 F.2d 767, 769 (9th Cir. 1948) (noting that the legislative history of the exceptions to the FTCA are "singularly barren of Congressional observation apposite to the specific purpose of each exception"), our analysis leads us to a clear and definitive result. We agree with those courts that have found the term not to require an express declaration of war. *See Vogelaar v. United States*, 655 F.Supp. 1295, 1302 (E.D. Mich. 1987); *Rotko v. Abrams*, 338 F.Supp. 46, 47 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (2d Cir. 1972); *Morrison v. United States*, 316 F.Supp. 78, 79 (M.D.Ga. 1970).

The problem we face arises from the fact that the power to declare war is vested in Congress, *see* U.S. Const. art. I, section 8, cl. 11. Here, the Congress did not exercise that power. The question, then is: may we nevertheless conclude, for purposes of the FTCA, that a "time of war"

exists? We are strongly influenced by the fact that in modern times hostilities have occurred without a formal declaration of war far more frequently than following a formal pronouncement. No formal declaration occurred at the time of the Korean war. That war officially called a "police action." Church, *History and the Constitutional Role of Courts.* 1990 Wisconsin L.R. 1071, 1097 n. 85 (1990). The war in Vietnam was waged with no more than a Congressional resolution. The war in Vietnam was waged with no more than a Congressional resolution. *See* Vance, *Striking the Balance: Congress and the President under the War Powers Resolution, 133 U. Pennsylvania L.R.* 79, 80 (1984). Our invasions of Panama and Grenada were undertaken by the Chief Executive on his own initiative. *See* Trimble, *The Constitutional Common Law of Treaty Interpretation, 137 U. Pennsylvania L.R.* 1461, 1474 (1989); Firmage and Wrona, *The War Power,* 59 George Washington Law Review 1684, 1700-01 (1991). Perhaps more surprising, there was no formal declaration of war prior to the "liberation" of Kuwait or the invasion of Iraq; in fact, the word "war" is notably absent from the Iraq Resolution except in subsection 2(c), where it appears only in the title of the War Powers Resolution. *See* J. Sidak, *To Declare War, 41 Duke L.J.* 27, 46-48 (1991); Pub.L.No. 102-1, 105 Stat. 3 (1991), reprinted in 137 Cong.Rec. S403-04 (daily ed. Jan. 12, 1991). Moreover, the Iraq Resolution was passed only after the President publicly asserted that he did not need congressional authorization to attack that nation. *See, e.g.,* Sidak, 41 Duke L.J. at 43 and n. 75. Yet no one can doubt that a state of war existed when our armed forces marched first into Kuwait and then into Iraq. Accordingly, the fact that our participation in the tanker war was not supported by a formal declaration of war is in no way inconsistent with the conclusion that a state of war or "time of war" existed.

We do not express any view concerning the constitutionality of acts of war by American armed forces in the absence of a formal declaration of war. We simply note that such acts have occurred with regularity in recent years, and that from a practical standpoint "time of war" has come to mean periods of significant armed conflict rather than times governed by formal declarations of war. Since neither the text nor the legislative history of the FTCA expressly states whether Congress intended the combatant activities exception to apply to undeclared conflicts, we must arrive at our conclusion primarily through the use of those techniques to which we have previously adverted -- reason and judgment. Here, that process leads us, inexorably, to construe the exception in light of contemporary realities. By giving the term "time of war" its full current meaning rather than a crabbed, artificial, or technical reading we make common sense out of unclear words and best effectuate the purposes of the statute: we shield the government from the type of liability it never intended to assume.

It seems clear that the purpose of the exception we are construing is to ensure that the government will not be liable for negligent conduct by our armed forces in times of combat. Whether that combat is formally authorized by the Congress or follows less formal actions of the Executive and Legislative branches would seem to be irrelevant to Congress's objectives. We perceive three principal reasons for the combatant activities exception. First, tort law is based in part on the theory that the prospect of liability makes the actor more careful. *See, e.g.*, O.W. Holmes, Jr., *The Common Law* 31-33 (M.D. Howe ed. 1963); G. Calabresi, *The Costs of Accidents* (1970). Here Congress certainly did not want our military personnel to exercise great caution at a time when bold and imaginative measures might be necessary to overcome enemy forces; nor did it want our

soldiers, sailors, or airman to be concerned about the possibility of tort liability when making life or death decisions in the midst of combat. Second, tort law is based in part on a desire to secure justice -- to provide a remedy for the innocent victim of wrongful conduct. *See, e.g., Restatement (Second) of Torts* § 901 (1965). War produces innumerable innocent victims of harmful conduct -- on all sides. It would make little sense to single out for special compensation a few of these persons -- usually enemy citizens -- on the basis that they have suffered from the overwhelming and pervasive violence when each side intentionally inflicts on the other. Third, there is a punitive aspect to tort law. *See id.* Society believes tortfeasors should suffer for their sins. It is unlikely that there are many Americans who would favor punishing our servicemen for injuring members of the enemy military or civilian population as a result of actions taken in order to preserve their own lives and limbs. For these and other reasons, tort law, in toto, is an inappropriate subject for injection into the area of military engagements. The FTCA clearly recognizes this principle, and we see no reason why Congress would want to differentiate in this respect between declared and undeclared wars.

In sum, we have no difficulty in concluding that when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation, the FTCA exception applies. Under those circumstances, a "time of war" exists, at least for purpose of domestic tort law.

There can be no doubt that during the "tanker war" a "time of war" existed. The United States' involvement in naval combat while the Iran-Iraq war was in progress was the

result of a deliberate decision on the part of the executive branch to engage in hostile military activities vis-a-vis Iran in order to protect Gulf shipping. Our activities included not only the defense of reflagged tankers servicing Iraq's needs, but ultimately attacks upon Iranian gunboats and oil platforms. The Vincennes' actions constituted a part of our military involvement in the Persian Gulf. The act of shooting down the Iranian civilian aircraft, although a result of tragic error, was committed in order to further the perceived interests of the United States in its involvement in the tanker war. Moreover, we believe that the ill-fated Iranian Airbus may fairly be said to have been operating "during time of war" both temporarily and spatially. The aircraft took off from an Iranian airport used for both civilian and military purposes. Its flight path was in the general area in which hostilities had occurred with regularity over the past year. The United States had issued warnings to all aircraft operations in the region notifying them of the dangers. The pilots of the Iranian aircraft should not have been surprised to encounter conditions of "war". Under the circumstances, we believe that the shooting down of the Airbus by the Vincennes falls within the FTCA's exception for combatant activities during time of war. Accordingly, the plaintiffs' FTCA action against the Vincennes is barred by the doctrine of sovereign immunity.

[9] The result would be no different if the downing of the civilian plane had been deliberate rather than the result of error. The combatant activities exception applies whether U.S. military forces hit a prescribed or an unintended target, whether those selecting the target act wisely or foolishly, whether the missiles we employ turn out to be "smart" or dumb, whether the target we choose performs the function we believe it does or whether our choice of an object for destruction is a result of error or miscalculation. In other

words, it simply does not matter for purposes of the "time of war" exception whether the military makes or executes its decisions carefully or negligently, properly or improperly. It is the nature of the act and not the manner of its performance that counts. Thus, for purposes of liability under the FTCA, it is of no significance whether a plane that is shot down is civilian or military, so long as the person giving the order or firing the weapon does so for the purpose of furthering our military objectives or of defending lives, property, or other interest. To put it in the terms of the statute, the only question that need be answered is whether the challenged action constituted combatant activity during time of war.[6]

[10] We now turn to the plaintiffs' action under the PVA. Unlike the FTCA, the PVA contains few express exceptions, and it does not contain an analog to the FTCA's combatant activities exception into the PVA. *See B & F Trawlers, Inc. v. United States*, 841 F.2d 626, 628-29, 632 (5th Cir.1988) (incorporating the discretionary function exception into the PVA but refusing to incorporate the law enforcement exception); *see also Canadian Transport Co. v. United States*, 663 F.2d 1081, 1086 (D.C.Cir.1980) (incorporating the discretionary function exception into the Suits in Admiralty Act). Incorporation of the combatant

---

6 As we suggested in n.2, *supra*, it also does not matter who is the aggressor or who is the innocent party, either with respect to the initiation of an overall conflict or with respect to a specific incident. Thus, the merits of the Iran-Iraq war, of the tanker war, and of our involvement in the Gulf dispute are of no relevance here; nor is the cause, proximate or otherwise, of the decision to shoot down the Airbus. However, if the decision to shoot down the Airbus had been made with full knowledge of the aircraft's civilian status, the basis for our holding that plaintiffs' action against the defense contractors fails would be different: under such circumstances, there would be no basis at all for a negligence claim against those defendants.

activities exception into the PVA is particularly appropriate.

The FTCA's combatant activities exception specifically covers activities of naval and Coast Guard vessels. Unless a similar exception is read into the PVA, this specification will be rendered nearly meaningless. The FTCA and the PVA are mutually exclusive, *see* 28 U.S.C. § 2680(d), with only the latter providing a jurisdictional basis for tort suits arising from United States activities that "bear a significant relationship to traditional maritime activity." *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed.2d 454 (1972). As a result, it is far more likely that tort actions arising from the activities of naval and Coast Guard vessels will be brought under the PVA than the FTCA. Therefore, if Congress's manifest intent to maintain sovereign immunity from liability arising from the combatant activities of maritime vessels is to be given meaningful effect, the combatant activities exception must be incorporated into the PVA. We therefore hold that the waiver of sovereign immunity established by the PVA, like that established by the FTCA, contains an exception for combatant activities during time of war. Accordingly, the plaintiffs' PVA action fails for the same reason as does their FTCA action.

Defense Contractors

[11] The plaintiffs' against the Aegis manufacturers is not barred by sovereign immunity. Private parties are not entitled to such a defense. However, the Supreme Court has recognized that the exceptions to the FTCA may preempt common law tort action against defense contractors under certain circumstances. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 511, 108 S.Ct. 2510, 2518, 101 L.Ed.2d 442 (1988). We have also previously held that those

exceptions may preempt federal statutory tort actions. *See McKay v. Rockwell Int'l Corp.*, 407 F.2d 444 (9th Cir.1983) (holding that the discretionary function exception to the FTCA preempts an action against defense contractors brought under the Death on the High Seas Act, 46 U.S.C.App. § 761 *et seq.*) *cert. denied.* 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984). Thus, we must determine whether the plaintiffs' action against the Aegis manufacturers is preempted by the "combatant activities" exception.

[12] We hold that it is. We have previously suggested that the combatant activities exception would shield from liability those who supply ammunition to fighting vessels in a combat area. *See Johnson*, 170 F.2d at 770. A similar logic would seem to shield those who supply a vessel's weapons. The reason, we believe, is that one purpose of the combatant activities exception is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result authorized military action. While the purpose of the Aegis system may have been, in part, to protect the lives of United States servicemen, its purpose surely was not to protect the lives of enemy forces or persons associated with those forces. Neither the United States nor its defense contractors owed any duty to such individuals. Because the Iranian Airbus took off from an Iranian joint commercial-military airport, was flying in the area of a combat zone, and failed to communicate its civilian status to the crew of the Vincennes, the direction of force against the aircraft by United States naval forces cannot give rise to tort liability. The imposition of such liability on the manufacturers of the Aegis would create a duty of care where the combatant activities exception is intended to ensure that none exists. Accordingly, preemptions is appropriate. *See Boyle*, 487 U.S. at 511, 108 S.Ct. at 2518 (preemption appropriate when imposition of

liability on defense contractor "will produce the same effect sought to be avoided by the FTCA exception").

Conclusion

We hold that the plaintiffs action against the United States is barred by sovereign immunity and that their action against the Aegis manufacturers is preempted by federal law. Accordingly, the district court's orders dismissing the actions with prejudice are affirmed.

AFFIRMED.

KLEINFELD, Circuit Judge, concurring.

I concur in the result.

We probably can avoid resolving a constitutional issue, whether we lack jurisdiction under the political question doctrine, because sovereign immunity makes the case insubstantial on the merits. *Clow v. U.S. Department of Housing and Urban Development*, 948 F.2d 614, 616 (9th Cir.1991). Both political question doctrine and sovereign immunity go to jurisdiction. *Rivera v. United States*, 924 F.2d 948, 951 (9th Cir.1991) If it were necessary to reach it, I would conclude that we have no jurisdiction under the political question doctrine.

We flew the American flag on foreign vessels to protect shipping in the Persian Gulf during the Iran-Iraq war. An Iraqi warplane had successfully fired missiles at an American warship, the U.S.S. Stark. After more than a year of violent naval and air encounters, the Iranian passenger airplane took off during an exchange of fire between American and Iranian gunboats. The commander of the

Vincennes had to decide, in the heat of battle, whether to risk his sailors and his ship on the unidentified approaching plane. The United States paid money to the airplane passengers' estates, but made a point, for foreign policy purposes, of not acknowledging any wrongdoing.

The means and methods of making war are assigned to the executive branch by Article II, Section 2 of the Constitution. Every one of the reason for treating a question as outside our jurisdiction under the political question doctrine, listed in *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710 7 L.ed.2d 663 (1962), applies here. *Baker v. Carr* teaches that foreign relations and determination of when or whether a war has ended, illustrate areas of application of the doctrine. *Id.* at 211-13, 82 S.Ct. at 706-08; *see Sarnoff v. Connally*, 457 F.2d 809 (9th Cir.), *cert. denied sub nom. Sarnoff v. Schultz*, 409 U.S. 929, 93 S.Ct. 227, 34 L.Ed.2d 186 (1972). The Federalist Papers, explaining why the Constitution makes the President commander in chief says, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." The Federalist No. 74 (Hamilton), Cooke ed at 500 (1788).

The authorities upon which the majority relies do not extend federal court jurisdiction to questions of how we fight in combat. *The Paquete Habana*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900), did not raise the issue of justiciability. The executive branch filed the libel in admiralty, to obtain an adjudication of title, so the court had no occasion to adjudicate whether the executive branch was entitled to avoid judicial determination. The President had made an executive determination that the Spanish-American War was to be conducted according to international law, so the only question before the court was whether under

international law title to non-combatant fishing boats could pass under the doctrine of war prizes. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) resolved the scope of immunity from damage suits of state officials under the Eleventh Amendment and common law tort doctrine. It did not address whether the federal courts can adjudicate questions arising out of the federal executive's conduct in firing weapons at putative attackers during combat.

The phrase "time of war" in the Federal Tort Claims Act is ambiguous, so a literal construction cannot determine the scope of the exception. Does it mean a time during which Congress has declared war, or a time during which the military forces of the United States are engaged in the use of arms? If the former, the exception does not apply. If the latter, it does. The latter is a more reasonable interpretation. Congress probably did not intend that the government be liable for failure to exercise reasonable care for the safety of those against whom our armed forces are deployed in combat, whether war had formally been declared or not.

The Public Vessels Act does not create new causes of action against the United States. The Act subjects the government to liability in certain cases where a private vessel would be liable. *Allen v. United States*, 338 F.2d 160, 162 (9th Cir.1964), *cert. denied*, 380 U.S. 961, 85 S.Ct. 1104, 14 L.Ed.2d 152 (1965). The appellants have found no case where the statute was read to subject the United States to liability for conduct during combat of a warship. This unprecedented and surprising notion, that our warships must exercise reasonable care toward their targets even as they fire, seems unlikely to have been the intent of Congress and the President when they promulgated the law.

I agree with the majority, that the defense contractors did not owe a duty of reasonable care to those toward whom the weapons they made might be fired.

Sec. 2 (ii)

UNPUBLISHED OPINION AND ORDER OF DISMISSAL BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Filed June 11, 1990
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH BAILEY, As the Personal Representative, et al.	)	
	)	NOS. C 89 2338 TEH
Plaintiffs,	)	C 89 2872 TEH
v.	)	C 90 0337 TEH
VARIAN ASSOCIATES, et al.,	)	**ORDER**
Defendants.	)	

This matter comes before the Court on defendant United States and defendants' Varian Associates, General Electric Company, Syscon Corporation, and Computer

Sciences Corporation's motions to dismiss. Both motions advance the same grounds for dismissal: nonjusticiability, state secrets, and sovereign immunity. After carefully considering the parties' arguments, the Court has decided to GRANT the motions for the reasons set forth below.

BACKGROUND

Three related actions filed by the same plaintiffs, and later consolidated, are now before the Court. All three actions arise out of an incident on July 3, 1988 when a United States naval vessel, the USS Vincennes, shot down a commercial airliner of Iran, Iran Air Flight 655. All 290 passengers and crew aboard the airplane died. In the three actions, plaintiffs, personal representatives of over 97 passengers who were aboard the flight, are suing defendants, the United States as well as various defense contractors who supplied the ship, the ship's equipment or the ship's systems, on various tort-based causes of action and a claim under the Death on the High Seas Act. Because all three actions must fail because of the same military and foreign policy implications of the underlying event, the Court will address them collectively.

Judicial Notice

Both plaintiffs and defendants have requested that the Court take judicial notice of certain facts. The Court may consider facts subject to judicial notice on a motion to dismiss. *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385 (9th Cir. 1987) (citing *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1982). After carefully reviewing the parties' requests, the Court takes judicial notice of the following facts:

The President sent the Vincennes to the Persian Gulf to protect neutral vessels from the hostilities between Iran and Iraq. The official position of the United States Government regarding the incident, as stated by President Reagan in a letter to Congress dated July 4, 1989, was that: (1) prior to the incident the Vincennes was under fire from hostile Iranian boats; (2) the crew of the Vincennes believed Fight 655 to be a hostile military aircraft; and, (3) the actions of the USS Vincennes constituted justifiable self-defense as recognized in Article 5 of the United Nations Charter and pursuant to the President's authority with respect to foreign relations and as Commander and Chief of the Armed Forces. While the United States has made some form of *ex gratia* payments to the families of some of those killed in the incident, it maintains its position that the downing of the Iranian plane was an act of self-defense.

Both parties have asked the Court to take judicial notice of additional facts. The Court need not consider these additional requests, since even if the Court were to take judicial notice of this information, the information would not alter the Court's ruling here.

DISCUSSION

The Iran Air Flight 655 incident gave rise to substantially similar causes of action in a suit brought by different plaintiffs in the Central District of California. *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989). In an extremely thorough and well-reasoned opinion, Judge A. Wallace Tashima, dismissed that suit with prejudice on the same grounds that defendants base the instant motions. *See id.* After carefully reviewing *Nejad* in so far as it applies to the instant cases. Although plaintiffs' counsel in the instant case apparently offered considerably more thorough advocacy

than the plaintiffs' attorney in *Nejad*, the nature of the Iran Air 655 incident compels the Court to fall in line with the *Nejad*.

1. Nonjusticiability

As Judge Tashima held in regard to the same underlying event, plaintiffs' claims in all three actions before the Court question the Navy's decisions and the manner in which Navy personnel executed those decisions. *Nejad*, 724 F.Supp. at 755. (citing *Baker v. Carr*, 369 U.S. 186, 82 (1962). The Constitution clearly commits these affairs to the President as Commander in Chief and to his military and naval subordinates. As set forth in *Nejad*, the plaintiffs' claims consequently give rise to a political, nonjusticiable claim under *Banker v. Carr*, 369 U.S. 186, 82 (1962). *Nejad*, 753 F.Supp. at 755. As in *Nejad*, the fact that plaintiffs in the instant case plead their causes of action so as to focus on the allegedly negligent manner in which the military personnel carried out the President's decision, does not negate the nonjusticiable nature of the claim. *See id.* (citing *Rappenecker v. United States*, 509 F.Supp. 1024, 1030 (N.D. Cal. 1980)).

2. State Secrets

Defendants claim that plaintiffs' claims are barred under the state secrets doctrine. As *Nejad* detailed, the government holds military secrets as an absolute privilege provided that a formal claim of privilege is lodged by the head of the department which has control over the matter and the court determines that the claim of privilege is justified. *Nejad*, 724 F.Supp at 755 (citing *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)). In the instant case, as in *Nejad*, the Secretary of the Navy has lodged the requisite claim of

privilege, after personal consideration of the matter, on the grounds that disclosure of the AEGIS system technology, without which the instant cases cannot be adjudicated, would impair national security. *See id.* at 756.

3. Sovereign Immunity

Defendants claim that plaintiffs' complaint against the United States Navy is barred under the implied discretionary function exception of the Public Vessels Act. Plaintiffs' complaint against the United States alleges jurisdiction under the Federal Torts Claims Act (FTCA), the Public Vessels Act, Section 781, Title 46, U.S.C. (PVA), the Death of the High Seas Act, Section 761, Title 46, U.S.C. (DOHSA), and the Alien Tort Act (ATA).

At oral argument, plaintiffs' counsel correctly distinguished the instant case from *Nejad*. However, since in and of themselves, either of the above discussed doctrines, political question or state secrets, are sufficient grounds upon which to grant defendants' motion, the Court need not reach the sovereign immunity issue.

CONCLUSION

Accordingly, for the reasons set forth above, defendants' motions to dismiss are HEREBY GRANTED and this suit is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated 6/11/90

/s/
Judge Thelton E. Henderson,
United States District Court.

JUDGMENT IN A CIVIL CASE

United States District Court

DISTRICT: Northern District of Cal

CASE TITLE

ELIZABETH BAILEY, et al.,

v

VARIAN ASSOCIATES, et al.,

DOCKET NUMBER: C89-2338 TEH, C90-0337 TEH, C89-2872 TEH

NAME OF JUDGE OR MAGISTRATE: Thelton E. Henderson

☐ Jury Verdict. This action came before the Court and a jury with the Judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the Judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendants' motions to dismiss are HEREBY GRANTED.

FILED

JUN 11 1990

RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COPIES MAILED TO
PARTIES OF RECORD

BY

Richard W. Wieking

DEPUTY CLERK

DATE: JUN 11 1990

BEST AVAILABLE COPY

Sec. 3 (iii)

ORDER DENYING PETITION FOR REHEARING

Filed December 16, 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MITRA KOOHI; IMAN KOOHI, minor daughter; KOSAR KOOHI, minor daughter; HASSAN ALMASSI; IRAN AIR FLIGHT 655,	)	No. 90-16107
Plaintiffs-Appellants,	)	D.C. No. 90-1716-TEH
v.	)	**ORDER**
UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF NAVY,	)	
Defendants-Appellees.	)	

ELIZABETH H. BAILEY, as the Personal Representative, et al.	)	
Plaintiffs-Appellants.	)	No. 90-16159
v.	)	D.C. No. 89-02388-TEH
VARIAN ASSOCIATES, INC; GENERAL ELECTRIC CO.; GE AEROSPACE; RCA CORP.; HARNISCHFEGER INDUSTRIES; SYSCON CORP; COMPUTER SCIENCE CORPORATION; JOHN CONNOR,	)	
Defendants-Appellees.	)	

Before: SCHROEDER, REINHARDT, and KLEINFELD, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Sec. 4 (v)

OTHER APPENDED: EXCERPTS FROM THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO) REPORT OF ICAO FACT-FINDING INVESTIGATION

INTERNATIONAL CIVIL AVIATION ORGANIZATION
100 SHERBROOKE STREET WEST
MONTREAL, QUEBEC, CANADA H3A 2R2
CABLES: ICAO MONTREAL
TELEX: 05-24513
FACSIMILE TEL. (514) 288-4772
OFFICE TEL.: (514) 285-8038

11 January 1989
Ref.: AN 13/4.3 - 89/7

Subject: Report on investigation as required in Council decision of 14 July 1988

Action: To not the decision of the Council

* * * * * *

"I have the honour to send herwith also the Report of the ICAO fact-finding investigation which, by the decision of the Council of 7 December 1988, is no longer a restricted document."

* * * * * *

"S.S. Sidhu
Secretary General ..."

* * * * * *

"**DECISION OF THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICA0)**

4. Expressed again its profound regret over the loss of 290 lives and its deep sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families of the victims of this tragic event;

5. Urged all States to take all necessary action for the safety of navigation of civil aircraft, particularly by asurring effective co-ordination of civil and military activities;

6. Reaffirmed again the fundamental principle of general international law that States must refrain from resorting to the use of weapons against civil aircraft;

..."

* * * * * *

Attachment B to State letter AN 13/4.3 -89/7

DESTRUCTION OF IRAN AIR AIRBUS A300

IN THE VICINITY OF QESHM ISLAND,

ISLAMIC REPUBLIC OF IRAN

ON 3 JULY 1988

REPORT OF THE ICAO FACT-FINDING INVESTIGATION

NOVEMBER 1988

"1. **FACTUAL INFORMATION**

1.1 **History of flight**

1.1.1 On 3 July 1988 the Airbus A300B2-203, registration EP-IBU, was scheduled for four sectors of Iran Air scheduled passenger flights as follows:

Flight	Route	Scheduled Time
IR451	Tehran - Bandar Abbas	0330 - 0520
IR655	Bandar Abbas - Dubai	0620 - 0715
IR654	Dubai - Bandar Abbas	0815 - 0910
IR452	Bandar Abbas - Tehran	1010 - 1200

The crew reported for routine briefing and flight preparation in Tehran 1 hour 30 minutes prior to scheduled departure time. The first sector from Tehran to Bandar Abbas was on a repetitive flight plan. Take-off was at 0342 hours. The flight was uneventful and landed at Bandar Abbas at 0510 hours.

1.1.2 During the stop in Bandar Abbas the crew remained in the aircraft. No discrepancies or comments had been recorded in the Aircraft Technical Flight Log during the first sector, and this was confirmed to ground personnel by the flight crew. A turn-around check was carried out and no maintenance action was required.

1.1.3 A flight plan had been filed in Tehran for the sector from Bandar Abbas to Dubai (IF655). The departure from the termaintal at Bandar Abbas was delayed 20 minutes

due to an immigration problem involving one passenger involving one passenger. Prior to take-off from Bandar Abbas IR655 was given an enroute clearance to Dubai via the flight planned route A59 and A59W at FL140 following a simulated MOBET 1B departure with SSR mode A code 6760. The flight was instructed to contact Bandar Abbas approach control after take-off.

1.1.4 The flight took off from runway 21 (magnetic bearing 206 degrees) at 0647 hours and climbed straight ahead enroute (A59 magnetic track 203 degrees). Shortly after take-off IR655 contacted the Iran Air office at Bandar Abbas on company frequency 131.8 Mhz and passed a departure message with an estimate for Dubai. IR655 contacted Bandar Abbas approach control at 0649:18 and reported climbing out of 3500 ft estimating MOBET at 0652, the FIR boundary (DARAX) at 0658, and Dubai at 0715. Whilst still under the control of Bandar Abbas approach IR655 contacted Tehran ACC (southern sector) on frequency 133.4 MHz and at 0651:04 reproted out of FL70 for FL140, estimating the FIR boundary (DARAX) at 0658 and Dubai at 0715. This message was acknowledged by Tehran ACC with instructions to report maintaining FL140 and passing DARAX. Tehran ACC also requested IR655 to confirm squawking SSR code 6760 and received an affirmative reply. At 0654:00 IR655 reported to Bandar Abbas approach control passing MOBET out of FL120. Bandar Abbas instructed the flight to contact Tehran ACC which was acknowledged by IR655 at 0654:11. No further communication was recieved from IR655 by either Bandar Abbas approach control or Tehran ACC, nor was any communication from the flight received by Emirates ACC or Dubai approach control.

1.1.5 At 0654:43 the aircraft was destroyed by two surface-to-air missiles whilst climbing from FL120 to FL140 well within airway A59 south of MOBET, in the vicinity of Qeshm Island."

* * * * * *

"**1.5.1.1** The captain, 38 years of age, held an air transport pilot license issued on 2 May 1983 and valid until 5 August 1988. His rating for Airbus A300 was issued on 21 July 1985. He had also been rated for B737 (co-pilot) on 20 November 1975, B727 (co-pilot) on 10 August 1977, B747 (co-pilot) on 7 August 1979 and B737 (captain) on 2 May 1983. His last medical check was on 7 February 1988 with no waivers. His total flying experience was 7000 hours of which 2057 hours were on Airbus A300. His last proficiency check (simulator) was on 26 April 1988."

* * * * * *

"**c) <u>Equipment</u>:**

The aircraft was equipted witht he following communication adn avionics equipment relevant to the occurrence:

VHF	KING KTR 9100 A	No. 1 serial no. 3759 No. 2 serial no. 3989
Transponder	Collins 621A-6	No. 1 serial no. 3800 No. 2 serial no. 2881
ADF	Collins 51Y-7	No. 1 serial no. 6627 No. 2 serial no. 3129

VOR	Bendix RVA-33A	No. 1 serial no. 1776 No. 2 serial no. 1865
DME	Collins 860E-5	No. 1 serial no. 1166 No. 2 serial no. 7043
Weather radar	Bendix RDR-1F	No. 1 serial no. 2554 No. 2 serial no. 3681
Radio altimeter	TRT AHV5-011A5	No. 1 serial no. 6060 No. 2 serial no. 5441
GPWS	Sundstrand 965-0376-070	No. 1 serial no. 1722 No. 2 serial no. -- "

* * * * * *

"**1.7.2** The weather in the area to the south of Bandar Abbas at 0700 hours was fair to partly cloudy with scattered stratocumulus at 3000 ft, scattered altocumulus at 10000 - 12000 ft and high cirrus. Visibility ranged from 5 to 10 km in haze. The air temperature over adjacent coastal areas was 35 to 38 degrees C and over the sea 28 to 30 degrees C. Surface pressure was 997 hPa."

* * * * * *

"**1.9.1** The radio communications between IR655 and civil ATC units were normal with no indication of difficulties in establishing and maintaining communications.

1.9.2 **Bandar Abbas TWR/APP.** IR655 was in contact with Bandar Abbas TWR on 118.1 MHz and Bandar Abbas APP on 124.2 MHz. In addition, Bandar Abbas

provides for frequencies 121.9 MHz and 121.5 MHz. All communications on these frequencies were recorded."

* * * * * *

"1.15 **Search and rescue**

1.15.1 At 0651:04 hours IR655 reported to Tehran ACC out of FL70 climbing to FL140, estimating the FIR boundary (DARAX) at 0658, and Dubai at 0715. In the absence of any further communications with Theran ACC, the contoller assumed that IR655 had contacted Dubai APP. However, no radio or radar contact was made with the flight by either Emirates ACC or Dubai APP. At 0718 Emirates ACC contacted Tehran ACC and requested the position of IR655. Recognizing that the flight had not arrived at its destination, the controller at Tehran ACC contacted adjacent ATS units for information on the flight. When no further information could be obtained, search and rescue action was initiated, and the assistance of the United Arab Emirates was requested."

* * * * * *

"2. **ANALYSIS**

2.1 **Background information on the situtation in the Gulf**

2.1.1 As a result of difficulties experienced by international shipping in the Gulf, naval forces of several States entered the area to provide a protective presence and safeguard the freedom of navigation. The extend and intensity of hostile activitires varied considerabley from time to time. The incident on 17 May 1987 in which the USS Stark

was severely damaged by two air-launched Exocet missiles was of particular relevance in the chain of events leading to the destruction of flight IR655."

* * * * * *

2.2 Notice promulgated by the United States

2.2.1 In early 1984 the United States had issued a notice that their naval forces in the Gulf, Strait of Hormuz, Gulf of Oman and Arabian Sea (north of 20 degrees north) were taking defensive precautions. Aircraft below 2000 ft which were not cleared for approach to or departure from an airport were requested to avoid floying closer than 5 NM to United States warships. The notice further requested that aircraft approaching within 5 NM of United States warships must establish and maintain radio contact with them on 121.5 MHz or 243 MHz. It also stated that aircraft approaching within 5 NM below 2000 ft and whose intentions were unclear to United States warships may be held at risk by defensive measures."

* * * * * *

"**2.2.5** **Safety implications.** The full implications of the rules of engagement of the United States warships were not sufficiently reflected in the notice promulgated by the United States. It was not specified what was considered to be `operating in a threatening manner', what distance was considered `well clear of United States warships', and what was meant with `could place the aircraft at risk by United States defensive measures'. The safety risks imposed by the presence of naval forces in the Gulf area to civil aviation may have been underestimated, in particular as civil aricraft

operated on promulgated tracks including standard approach and departure routes from airports in the area."

* * * * * *

"2.4 **Frequency and regularity of traffic on ATS route A59**

2.4.1 Iran Air flight IR655 was a regular scheduled passenger service from Bandar Abbas to Dubai. During the month preceding 3 July 1988 the flight was operated twice a week, on Tuesdays and Sundays, with the exception of Sunday 19 June 1988. In addition there were 28 other Iran Air flights between Kabul and Dubai, and 23 flights between Kabul and Jeddah via ATS route A59."

* * * * * *

"2.5 **`Red alert' procedure applied by Iranian air traffic services**

2.5.1 ATS unites in the Islamic Republic of Iran were notified through a `red alert' procedure of those military activities which posed a risk to the safety of civil aircraft. When a `red alert' was in effect, no ATC clearances were given to civil aircraft intending to operate through the affected airspace. In some instances Iranian aircraft already enroute had been recalled. On 3 July 1988 no `red alert' status was in effect and the ATC units at Tehran and Bandar Abbas were unaware of any activities at sea."

* * * * * *

"**2.7.4** Although there wer no set procedures for the handling of the communications, information from Iran Air

pilots and flight operations staff in Tehran indicated that at take-off the likely VHF selections were: Bandar Abbas tower (118.1 MHz) and Bandar Abbas approach (124.2 MHz) on VHF no. 1 and teh company frequency (131.8 MHz) and 121.5 MHz on VHF no. 2. Tehran ACC (133.4 MHz) would have replaced Bandar Abbas tower on VHF no. 1 after take-off. The call made by IR655 to Tehran ACC whilst under the control of Bandar Abbas approach was not a required procedure but was common practice by flight crews. It was not apparent whether this call would have been made on VHF no. 1, thus accepting a brief interruption of guard of the approach frequency, or on VHF no. 2 which would not have allowed guard of 121.5 MHz for a brief period. The flight remained under the control of Bandar Abbas approach from 0649:18 to 0654:11. The communication between IR655 and Tehran ACC took place between 0650:54 and 0651:30. The available information was not sufficient to determine which radio set was used for each transmission."

* * * * * *

"**2.8.4** There was no co-ordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the Gulf area. Such co-ordination would have enabled or at least facilitated identification of civil flight operations. The United States warships were not provided with equipment for VHF communications other than on the international air distress frequency 121.5 MHz. Thus, they could not monitor civil ATC frequencies for flight identification purposes."

* * * * * *

"**2.9.3** **Illumination with weapons fire control radar.** The United States notice current on 3 July 1988, as well as previous issues, stressed that the illumination of a United States warship with a weapons fire control radar would be viewed with suspicion and could result in immediate defensive reaction. No United States warship was illuminated with a weapons fire control radar during the flight of IR655.

2.9.4 United States warships expected no reaction from a civil flight illuminated by fire control radar since civil aircraft did not carry detection equipment. IR655 was so illuminated by the USS Sides at approximately 0650 hours and by USS Vincennes prior to missile launch. There was no reaction from the contact (IR655) to either of these illuminations.

2.10 **Analysis of the challenges made to IR655**

2.10.1 A total of eleven challenges were broadcast by United States warships between 0649:39 and 0654:47 with respect to the radar contact (IR655). Seven challenges were made by USS Vincennes on the military air distress frequency 243 MHz. Three challenges were made by USS Vincennes and one by USS Sides on the international air distress frequency 121.5 MHz."

* * * * * *

"**2.10.3** As civil aircraft did not carry radio equipment capable of being tuned to 243 MHz, these transmissions had no relevance as challenges to a civil aircraft."

* * * * * *

"**2.10.7** The recording of frequency 121.5 MHz at Bandar Abbas ATC did not contain any communications from 0640 until 0656:43 hours when the latter part of a challenge was recorded. This recording corresponded to a challenge broadcast by USS Vincennes to another unidentified contact (military C-130) approximately two minutes after the destruction of flight IR655."

* * * * * *

"**2.10.10** **Information contained in the challenges on 121.5 MHz.** It was relevant to examine whether the flight crew would have been able to readily identify themselves as the subject of the challenges on 121.5 MHz. The Iran Air flight crews were well versed with the use of English which was required by the Iranian Civil Aviation Authority. The majority of transmissions between IR655 and Bandar Abbas TWR/APP and Tehran ACC were conducted in English."

* * * * * *

"**2.10.18** **SSR code.** Only the fourth challenge, issued by USS Sides, included the SSR code displayed by IR655. This code being unique to a particular flight, recorded on the flight log and indicated on teh SSR selector box, could be expected to be immediately recognizable to the flight crew.

2.10.19 There was no response to the four challenges made on frequency 121.5 MHz, either by radio or by a change of course. This indicated that the flight crew of IR655 either was not monitoring frequency 121.5 MHz in the early stages of flight, or did not identify their flight as being challenged."

* * * * * *

"**2.11.3** All seven challenges issued by USS Vincennes on 243 MHz were addressed to Iranian aircraft, Iranian fighter or Iranian F-14. The third and fourth challenges contained the word fighter and the fifth challenge F-14. USS Vincennes also issued three challenges on the emergency frequency 121.5 MHz addressed to unidentified aircraft. There appeared to have been an emphasis on challenges on 243 MHz by USS Vincennes consistent with the perceived threat of possible F-14 activities."

* * * * * *

"**2.12.1** USS Sides did not issue challenges on 243 MHz. At the end of the second challenge when USS Vincennes transmitted on 121.5 MHz `request you alter course immediately', USS Sides instantly added `to 270 immediately'. The fourth and last challenge on 121.5 MHz was issued by USS Sides and was addressed `unidentified aircraft squawking 6760 mode 3'. This was the SSR code displayed by IR655."

* * * * * *

"**3.** **CONCLUSIONS**

3.1 **Findings**

3.1.1 The flight crew of flight IR655 was propertly certificated and qualified for the scheduled international passenger flight in accordance with existing regulations. There was no indication that the flight crew may not have been physically or psychologically fit."

* * * * * *

"**3.1.6** On 3 July 1988 no 'red alert' status was in effect and the ATC units at Tehran and Bandar Abbas were unaware of any activities at sea.

3.1.7 Flight IR655 departed Bandar Abbas airport terminal 20 minutes after the scheduled time.

3.1.8 The flight crew had correctly selected SSR mode A code 6760. SSR mode C (automatic pressure altitude transmission) was functioning.

3.1.9 After take-off the aircraft climbed straight ahead enroute and the climb profile was normal. It followed airway A59 and remained well within its lateral limits. The use of FL140 or FL160 was normal for flights on airwasy A59 and A59W from Bandar Abbas to Dubai."

* * * * * *

"**3.1.11** No electronic emissions from the aircraft, other than SSR responses, were detected by United States warships."

* * * * * *

"**3.1.13** Apart from the capability to communicate on the emergency frequency 121.5 MHz, United States warships were not equipped to monitor civil ATC frequencies for flight identification purposes."

* * * * * *

"**3.1.15** Four challenges addressed to an unidentified aircraft (IR655) were transmitted by United States warships on frequency 121.5 MHz (three from USS Vincennes and one from USS Sides).

3.1.16 There was no response to the four challenges made on 121.5 MHz, either by radio or by a change of course. This indicated that the flight crew of IR655 either was not monitoring 121.5 MHz in the early stages of flight, or did not identify their flight as being challenged."

* * * * * *

"**3.1.19** Information on civil flight schedules was available in the Combat Information Centre of USS Vincennes. However, in the form presented, it was of extremely limited value for the determination of estimated time of overflight of individual aircraft. Flight plan information and flight progress data, including information on assigned SSR mode A codes, were not available to assist in flight identification.

3.1.20 There was no co-ordination between United States warships and the civil ATS units reponsible for the provision of air traffic services within the various flight information regions in the Gulf area.

3.1.21 Iran Air flight crews were well versed with the use of English and the majority of communications between IR655 and Bandar Abbas TWR/APP and Tehran ACC were conducted in that language.

3.1.22 The contents of the challenges and warnings issued to IR655 on 121.5 MHz varied from one transmission to the next. It is uncertain whether the flight crew would

have been able to rapidly and reliably identify their flight as the subject of these challenges and warnings. Although course information given could have been recognizable to the flight crew of IR655, speed information given on the basis of ground speed may not have been recognizable by the pilot. Bearing and range information to the warship was of little relevance to the pilot. Position information in geographical co-ordinates was not a practical method to establish identification. The SSR mode A code displayed by IR655 could have been immediately recognizable to the flight crew, but was given only in the final challenge."

* * * * * *

"4. **SAFETY RECOMMENDATIONS**

4.1 In the areas where military activities potentially hazardous to the civil flight operations aircraft take place, optimum functioning of civil/military co-ordination should be pursued. When such military activities involve States not responsible for the provision of air traffic services in the area concerned, civil/military co-ordination will need to include such States. To this end:

a) Military forces should, initially through their appropriate State authorities, liaise with States and ATS units in the area concerned.

b) Military forces should be fully informed on the extent of all promulgated routes, types of airspace, and relevant regulations and restrictions.

c) Advance information on scheduled civil flights should be made available to miltary units including the allocated SSR mode A codes when available.

d) Direct communications between military units and the appropriate ATS units, not using regular ATC or the emergency frequencies, should be established for the exchange of real time flight progress information, delays and information on non-scheduled flights.

e) Military units should be equipped to monitor appropriate ATC frequencies to enable them to identify radar contacts without communciation.

f) If challenges by military units on the emergency frequency 121.5 MHz become ineveitable, these should follow an agreed message format with content operationally meaningful to civil pilots.

g) In areas where such military activities occur, information necessary for the safety, regularity and efficiency of air navigation should be promulgated in a suitable form. The information should contain the type of challenges that might be transmitted, and should include instructions to pilots of civil aircraft to monitor the emergency frequency 121.5 MHz.

h) To assist identification by electonic emissions, pilots of civil aircraft should ensure continuous operation of airborne weather radars and radio altimeters."

* * * * * *

UNITED STATES NAVY INVESTIGATION REPORT PUBLISHED AS APPENDIX F -- ICAO INVESTGATION

"INVESTIGATION REPORT

Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988"

"From: Rear Admiral William M. Fogarty, USN
To: Commander in Chief, U.S. Central Command

Subj: FORMAL INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DOWNING OF A COMMERCIAL AIRLINER BY THE USS VINCENNES (CG 49) ON 3 JULY 1988 (U)

Ref: (a) JAG Manual

1. As directed by Commander in Chief, U.S. Central Command, and in accordance with reference (a), a formal investigation was convened on 3 July 1988. The original record of hearings and additional documents are forwarded."

* * * * * *

"**11.** During the investigation, the importance of the information being presented by way of the USS VINCENNES Large Screen Displays (LSD) became apparent. Therefore, an explanation of that system's capabilities and limitations is provided here fore the benefit of the reviewer."

* * * * * *

"... However, it is important to note, that altitude cannot be displayed on the LSD in real-time."

* * * * * *

"**2.** During the course of the gun engagement of the Iranian small boats, the USS VINCENNES, at approximately 0654Z, had maneuvered into a position one mile west of the

centerline of civilian airway Amber 59. The USS SIDES, transmitting from east to west through the SOH, was approximately 18 miles to the east and became involved in the evolving tactical situation.

D. BANDAR ABBAS/IRAN AIR FLIGHT 655/AIR ENGAGEMENT

3. On 3 July 1988, at approximately 0647Z, an Iran Air Airbus 300, Iran Air Flight 655, took off from the Bandar abbas joint military/civilian airport destined for Dubai airport. The flight was a routine scheduled, international flight via commercial airway Amber 59."

* * * * * *

"**(f)** At approximately 06:54, the CO turned the firing key. Two SM-2 Blk II missiles left the rails. They intercepted Iran Air Flight 655 at a range of 8NM from USS VINCENNES at an altitude of 13,500 feet."

* * * * * *

"**5. Commercial Air**"

* * * * * *

"**(5)** The width of the airway assigned to Iranian Air FLT 655 (A-59) was: 20NM (10NM either side of Centerline) from Bandar Abbas to reporting position DARAX and 10 NM (5NM either side of center line) to Sharjah. Airway A-59 runs from an altitude of 4500 feet to infinity. The total length of the air route is 123NM.

(6) At least one thousand seven hundred and seventy-five commercial air flights passed through Oman Center for the week ending 13 July 1988.

(7) The only message traffic available to CJTFME on civilian airline schedules was the `FICPAC' message of 25 June 1988. That message was readdressed to all CJTFME units on 28 June 1988.

(8) The CJTFME's inchop brief discussed commercial air traffic in general but does not focus on any specific air routes or COMAIR schedules.

(9) CJTFME's inchop brief discussed the use of MAD (Military Air Distress). Moreover ships are told to use IAD (International Air Distress) to contact commercial aircraft and `unless you are up a regional ATC frequency, use IAD to try to contact ATC.'

(10) The inchop brief alludes to the `very complex but ordered' commercial air picture. It cautions all units to be concerned with those air contacts which deviate from the normal pattern.

(11) The first time that CJTFME promulgated commercial airline flight information to the ships in the Persian Gulf area was on 28 June 1988. This message showed IR 655 scheduled to depart Baddar Abbas at 0950L (0620Z) on Tuesday and Sunday of each week."

* * * * * *

"**(13)** The only commercial IFF information available to any JTFME unit were pass-down items from other Middle East Force ships."

* * * * * *

"**(16)** On Sunday, 3 July 1988, there were 10 civilian flights scheduled from Bandar Abbas. They were:

FLT # TO	DEPT. TIME	ACFT TYPE
IR 655 DUBAI	0959L	AIRBUS 300
IR 236 BANDARLENGEH	1240L	737
IR 236 SHIRAZ	1240L	737
IR 236 TEHRAN	1240L	737
IR 452 TEHRAN	1340L	AIRBUS 300
IR 394 ISFAHAN	1400L	737
IR 394 TEHRAN	1400L	737
IR 134 SHIRAZ	2050L	737
IR 134 TEHRAN	2050L	737
IR 458 TEHRAN	2245L	AIRBUS 300

There is no information to the contrary that the remaining flights did not launch."

* * * * * *

"**(25)** Iran Air Flight 655 was a regularly scheduled biweekly flight from Bandar Abbas to Sharjah, often referred to as a `HAJ' flight by ships' crews."

* * * * * *

"**(27)** Airbus' normally climb at 350 - 370 KTS and cruise at 450 - 460 KTS."

* * * * * *

"**(7)** Iran Air Flight 655 took off from Bandar Abbas International Airfield on runway 21 at 0647Z. It was cleared to Dubai via A-59 at FL 140 (14,000FT) with an assigned IFF Mode III squawk of 6760. The pilot reported passing MOBET (position report) at 0654Z and vacating FL 120 (12,000 feet)."

* * * * * *

"**(9)** IR 655 was 3.35NM west of the centerline of air route A-59 at missile intercept, time 06:54 passing 13,500 climbing to an assigned altitude of FL 140 (14,000 ft) on course of 209.5T, at 383 KTS."

* * * * * *

"2. **Surface Engagement**

a. At approximately 0330Z, USS MONTGOMERY observed seven small Iranian gunboats approaching a Pakistani merchant vessel. USS MONTGOMERY reported at 033Z that small boats had manned machine gun mounts and rocket launchers.

b. Shortly thereafter USS MONTGOMERY observed a total of 13 Iranian gunboats breaking into three groups. Each group contained 3 to 4 gunboats with one group of four gunboats taking position off USS MONTGOMERY's port quarter.

c. [ ]

d. At 0411Z USS MONTGOMERY heard, over bridge to bridge, the gunboats questioning merchants in the area, and at approximately the same time heard 5 to 7 explosions coming from the north.

e. No merchant vessels requested assistance and by direction of `GS', at approximately 0411Z, US MONTGOMERY proceeded to the southern section of [ ]."

* * * * * *

"**h.** At 0615Z OCEAN LORD reported being fired on by one group of small boats (TN 4667)."

* * * * * *

"**i.** [ ], OCEAN LORD 25 crew observed several small flashes and puffs of smoke approximately 100 yards from the helo."

* * * * * *

"**r.** At 0639Z `GB' requested USS VINCENNES to verify the small boats were not departing. USS VINCENNES reported the boats were closing the USS VINCENNES and the USS MONTGOMERY."

* * * * * *

"**s.** At 0641Z `GS' gave permission to engage the small boats with gunfire."

* * * * * *

"**t.** At 0643Z USS VINCENNES and USS MONTGOMERY opened fire on two closing groups of Iranian small boats, including the group of small boats which had fired on OCEAN LORD 25.

u. CO MONTGOMERY reported that two small boats maneuvered erratically and appeared to close USS MONTGOMERY and USS VINCENNES. CO USS MONTGOMERY also stated his lookouts reported small arms fire coming from the small boats."

* * * * * *

"**v.** Crew members topside on USS VINCENNES reported small arms fire from the boats, and Repair Locker 2 personnel in USS VINCENNES reported hearing what might have been small arms rounds impacting the starboard bow area."

* * * * * *

"**w.** CO USS VINCENNES stated that the post-action analysis indicated that shrapnel, and/or spend bullets, impacted the starboard bow of the ship and the ablative coating behind the forward missile launcher."

* * * * * *

"**bb.** The foul bore in MT51 caused the TAO to maneuver the ship radically, using 30 degrees rudder at 30 KTS ship's speed, in order to keep MT52 pointed at the most threatening of the surface contacts.

cc. The high sped, large rudder angle turn caused books, publications and loose equipment to fall from desks and consoles in CIC.

dd. At 0703Z USS VINCENNES ceased firing on the small boats. A total of 72 rounds of 5"/54 ammunition was expended."

* * * * * *

"**(8)** The small boats did not turn away after the VINCENNES fired its first round, but continued to close.

hh. CJTFME considered the following indicators in granting permission to engage the small boats:

(1) Positive identification of the boats as those having committed a hostile act against a U.S. ship.

(2) The small boats were not leaving the area.

(3) The small boats were closing the USS VINCENNES and USS MONTGOMERY.

ii. USS MONTGOMERY and USS VINCENNES disengaged from the small boats when they ceased presenting a threat to U.S. ships."

* * * * * *

"**(g)** The data examined by NSWC Dahlgren indicated the following regarding the track of

interest (TN 4131):

(1) Altitude as seen by SPY-1 increased steadily, to a maximum of 13,500 feet at intercept.

(2) Altitude readings received from TN 4131's Mode III-C IFF transmission increased steadily from take-off at Bandar Abbas to a maximum of 12,900 feet 3 seconds before intercept.

(3) The only IFF Modes received from TN 4131 as a result of interrogations by the system was Mode III-6760."

* * * * * *

"IV.
OPINIONS

A. GENERAL

1. The USS VINCENNES did not purposely shoot down an Iranian commercial airliner. Rather, it engaged an aircraft the Commanding Officer, USS VINCENNES believed to be hostile and a threat to his ship and to the USS MONTGOMERY (FF 1082)."

* * * * * *

"**9.** The Commanding Officer VINCENNES decision to engage TN 4131 was based primarily on the following:

* * * * * *

"**(e)** Track 4131 was reported to be increasing in speed, decreasing in altitude, and closing range.

(i) The aircraft appeared to be maneuvering into an attack position.

11. The information available to CO, USS VINCENNES, upon which he based his decisions, conflicted in some cases with the data available in USS VINCENNES' command and decision (C&D) system. Specifically:

(b) The C&D system showed TN 4131 continuously ascending, while the CO received reports of `descending altitude' immediately prior to enabling the firing key.

12. Psychological factors: As the investigation developed, and it was discovered that there were disparities between the C & D tape data and what various members of the CIC believed they saw, the senior investigating officer requested the professional advice of USN Medical Corps. personnel who have studied combat stress. The following opinions draw heavily on their conclusions."

* * * * * *

"TIC's perception that there was an inexperienced, weak leader in the AAWC position led to the emergence of TIC in a leadership role. TIC's reports were accepted by all and could have influenced the final decision to launch missiles."

* * * * * *

"E. AIR ENGAGEMENT

1. [ ]."

* * * * * *

"2. At no time did IR 655 actually descend in altitude prior to engagement."

* * * * * *

"3. Iran Air Flight 655, an Airbus 300, was on a normal climb out from Bandar Abbas and was flying within the established air route, A-59, from Bandar Abbas to Dubai."

* * * * * *

"4. IR 655 was not on the exact center of airway A-59, but was 3.37 NM west of the centerline. However, it was in the assigned airway."

* * * * * *

"5. Iran Air Flight 655 was not squawking \mode \II-1100, but squawked Mode III-6760 during the entire flight."

* * * * * *

"8. The CO, 'GW' and key CIC AAW operators sincerely believed that they were engaging a hostile aircraft."

* * * * * *

"**11.** In the excitement of the impending engagement, it is entirely possible that reports of decreasing altitude passed over the net by TIC after the 15 NM point could have occurred if TIC passed only range values, which were interpreted as altitude, or he simply mis-read his CRO and interchanged altitude and range."

* * * * * *

"**3.** Due to heavy pilot workload during take-off and climb-out, and the requirement to communicate with both Approach Control and Tehran Center, the pilot of Iran Air Flight 655 probably was not monitoring IAD."

* * * * * *

"**8.** The current tools used by the U.S. Navy for differentiating between friendly and hostile unknown aircraft were designed primarily for the open ocean environment. U.S. Naval weapon systems can reach further and often react more quickly than sensors can evaluate. This is especially true in the Persian Gulf areas where reaction time is constrained by geography. Therefore, altitude is one of the most useful indicators for establishing `no hostile intent.'"

"V.
RECOMMENDATIONS"

* * * * * *

"**8.** That CJTFME continue to liaise with Air Traffic Control agencies and American embassies to resolve the COMAIR problems unique to the Persian Gulf Area (e.g., identification, communications, ICAO procedures, etc.)."

* * * * * *

"C. AEGIS SYSTEM RECOMMENDATIONS:

1. It is recommended the CNO:

a. Determine the cause of reported STC-2/IVCS net 15/16 degradation (due to loading), and issue a class advisory if required.

b. Reassess the design of the AEGIS large screen display (LSD) to allow the option of displaying altitude information directly on the LSD.

d. The matter of ascending and descending altitude of Flight 655 deserves special attention as there is a direct contradiction between special attention as there is a direct contradiction between the data tapes obtained from USS VINCENNES to the Commander, Joint Task Force Middle East (JTFME) following the engagement.

(2) In the final minute and forty seconds, the AAW tells his Captain, as a fact, that the aircraft has veered from the flight path into an attack profile, and is rapidly descending at increasing speed directly toward USS VINCENNES. Even though the tone of these reports must have seemed increasingly hysterical (yelling and shouting), the AAW made no attempt to confirm the reports on his own. Quick reference to the CRO on the console directly in front of him would have immediately shown increasing not decreasing altitude. Rather, this experienced and highly qualified officer, despite all of his training, relied on the judgement of one or two second class petty officers, buttressed by his own preconceived perception of the threat,

and make an erroneous assessment to his Commanding Officer. As he said, `I had no reason to doubt them. I had to make a split second recommendation to the Commanding Officer, and I had no reason to doubt them. I had to make a split second recommendation to the Commanding Officer, and I did.' While many factors played in Captain Rogers' final decision to engage, the last report by the AAW that the aircraft was rapidly descending directly towards the ship may have been pivotal."

* * * * * *

"**b.** I am issuing a non-punitive letter of censure to the AAW for his failure to take timely and effective action to ensure that the information he was communicating to his Commanding Officer was accurate."

"GEORGE B. CRIST
General, USMC
Commander in Chief"

* * * * * *

"SECOND ENDORSEMENT on Rear Admiral Fogarty's ltr of 28 July 1988

From: Chairman, Joint Chiefs of Staff
To: Secretary of Defense

Subj: FORMAL INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DOWNING OF IRAN AIR FLIGHT 655 ON 3 JULY 1988 (U)"

* * * * * *

"**8.** A special word should be said about the administrative censure awarded [ ] by CICENT. My own review of his performance is that, for the foregoing reasons, it did not constitute culpability. Moreover, the rationale behind a non-punitive letter is to point out lessons to be learned and ways to improve an officer's future performance. It is intended to be a private letter, not part of the officer's record, and not to influence an officer's career prospects. Due to the unusual public attention directed to this event, I believe that a non-punitive letter can hardly be issued and meet the spirit in which such a censure is intended. Therefore, I recommend that the administrative censure [ ], reported in paragraph 4b of the first endorsement be disapproved."

* * * * * *

"But beyond these specific fixes, I recommend that some additional human engineering be done on the display systems of AEGIS. The objective would be to better equip it for assisting with rapid decisions in a situation such as VINCENNES confronted. Secretary Carlucci and I visited the AEGIS mock-up at Wallop's Island for a briefing on AEGIS and a partial reconstruction of the Flight 655 shootdown. It seemed to our inexperienced eyes that the Commanding Officer should have some way of separating crucial information from other data. Moreover, the vital data should be displayed in some fashion on the LSD so the Commanding Officer and his main assistants do not have to shift their attention back and forth between displays."

* * * * * *

"WILLIAM J. CROWE, JR.
Chairman Joint Chiefs of Staff"

* * * * * *

Sec. 5 (v)

OTHER APPENDED: ARTICLE 3 BIS AMENDED *THE CONVENTION ON INTERNATIONAL CIVIL AVIATION*

Article 3 bis

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

Sec. 5 (v)

OTHER APPENDED: EXCERPTS FROM PETITIONERS' COMPLAINT IN C-90-0337 TEH

"**6.** The U.S.S. Vincennes and its crew were in the Persian Gulf under orders from the United States Navy and the Department of Defense and was charged with the duty of protecting civil commerce in the Persian Gulf."

* * * * * *

"**b.** The U.S.S. Vincennes and other United States naval vessels had been in the Persian Gulf for a substantial time prior to July 3, 1988. During this time period in the exercise of ordinary care in carrying out their determined duty of protecting commerce in the Persian Gulf, the officers and crew of the U.S.S. Vincennes and other vessels should have established communications with civilian air traffic in the Persian Gulf and should have been in regular communication with control towers, air route traffic control centers and commercial air craft so that these channels of communication could be utilized in a timely manner."

* * * * * *

"**i.** The officers and crews of the U.S.S. Vincennes failed any reasonable manner to carry out their mission which was to protect commerce in the Persian Gulf. This failure was not intentional but was caused by negligence, carelessness and failure to carry out routine and normal procedures."

Sec. (v)

OTHER APPENDED: EXCERPTS FROM PETITIONERS' FIRST AMENDED COMPLAINT IN C-89-2388 TEH

"5. At all times herein mentioned said defendants, and each of them, knew and intended that the Aegis Electronic Warfare System would be purchased by the United States of America and used by the United States of America in reliance on the duty of said defendants, and each of them, to provide the United States of America with, *inter alia*:

a. Reasonably precise specifications;

b. Equipment which conformed to those specifications; and

c. Warnings about the dangers in the use of the equipment that were known to said defendants, and each of them, and which were not known to the United States of America.

6. Said defendants, and each of them, failed to provide the United States of America with, *inter alia*:

a. Reasonably precise specifications;

b. Equipment which conformed to those specifications; and

c. Warnings about the dangers in the use of the equipment that were known to the defendants, and each of them, and which were not known to the United States of America."

Sec. 8 (v)

OTHER APPENDED: EXCERPTS FROM STATEMENT BY LEGAL ADVISOR OF UNITED STATES DEPARTMENT OF STATE

"COMPENSATION FOR IRANIAN AIRBUS TRAGEDY

by Abraham D. Sofaer

Statement prepared for the Defense Policy Panel of the House Armed Services Committees on August 4, 1988. Mr. Sofaer is the Legal Adviser of the Department of State[1]."

* * * * * *

"Very few instances exist in which a nation responsible for shooting down a civilian airliner has refused to pay compensation. The two most notorious examples both involve the Soviet Union."

Sec. 9 (v)

OTHER APPENDED: EXCERPTS FROM EYE WITNESS ACCOUNT BY COMMANDER DAVID R. CARLSON, COMMANDING OFFICER OF USS SIDES (FFG-14) FROM *PROCEEDINGS*, SEPT., 1989

"The Vincennes Incident

Commander David R. Carlson, U.S. Navy, Commanding Officer, USS Sides (FFG-14)--I cannot bear to read yet another apologia for the Vincennes (CG-49) incident without commenting. Nearly a year after the incident we have learned little. Many people still believe that the entire affair was precipitated by the Iranians themselves, or that the Vincennes defended herself against an attack. Almost immediately after the event, the media were full of stories speculating about the number of naked bodies in the water, conjuring up visions of an Iranian F-14 using an airliner as cover for an attack, insinuating that the plane that was shot down was too small to be Airbus, or...The number of gunboats actually involved in the surface action grew, like Pinocchio's nose, to a record of 14 or so."

* * * * * *

"A review of the facts is in order. When the decision was made to shoot down the airbus, the airliner was climbing, not diving; it was showing the proper identification friend or foe--IFF (Mode III); and it was in the correct flight corridor from Bandar Abbas to Dubai. The Vincennes was never under attack by Iranian aircraft. There was no targeting being done by the Iranian P-3. There was no coordinated

attack involving the Iranian Revolutionary Guard Corps (IRGC) boats and Iranian military forces. Iran Air Flight 655, also known as track number (TN) 4131, was mistakenly classified by the Vincennes as an Iranian F-14 diving at the ship."

* * * * * *

"My experience was that the conduct of Iranian military forces in the month preceding the incident was pointed nonthreatening. They were direct and professional in their communications, and in each instance left no doubt concerning their intentions. Yes, there had been an alert concerning a possible attack during the 4th of July weekend--and every other day--by every conceivable method (or so it seemed). The briefings that I received from two other commanding officers in the Gulf before taking command of the Sides in early June were invaluable. They essentially advised that I read the message traffic, absorb the contents, then go on deck and look around. Their message was clearly aimed at emphasizing the fact that--war or no war--life in the Gulf went on: fishermen fished; commerce continued, but the mission was to reduce tension when possible, to show by our presence that we were resolved to protect U.S. interests, and to demonstrate prejudice against any unnecessary conflict."

* * * * * *

"No gain is made by ducking the issues. No profit has come from the pathetic postincident attempts to place the blame on the victims. View it as you will, Iran Air Flight 655 was shot down for no good reason."

* * * * * *

"Was the Vincennes attacked? Stating that the speedboats did not leave the area after the cruiser began to fire is a curious way indeed to describe an attack. It just does not add up. The harder you look at it, the more absurd the concept seems that a few speedboats would be taking on the Vincennes and the Elmer Montgomery with any notion of success. In any event, they would surely not want to alert the Vincennes by shooting at the helicopter. I hold a minority view: The helicopter drew fire because it was a nuisance to the IRGC boats. The Vincennes saw an opportunity for action, and pressed hard for Commander Middle East Force to give permission to fire. Deescalation went out the window. Equipment failed. The 'fog' rolled in...

At the time of the disaster the rush to put a happy face on the entire affair did not serve us well. It may have been politically correct in view of the many high-level official U. S. government statements immediately after the incident endorsing the Vincennes's action. As military professionals, however, we owe ourselves more. We need to examine the issues, ask the hard questions, and get on with improvements in training and information processing. We need to stress the requirement for the quality of personnel as well as systems, and to divorce tactical thought--as much as possible--from political influence. We need to get smart about which systems to employ in various scenarios.

The main lesson here is not, and should not be, that 'wars beget accidents.' That is axiomatic, but we were not at war. Above all, we must not concede that 'accidents--terrible accidents like this one--are unavoidable.' That is a cop-out. This tragedy was avoidable, and we must learn from it."

"AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ" *PUBLIC LAW* 102-1 (H.J. Res. 77) January 14, 1991

For Signing Statement of Act, see p. 3.

Joint Resolution to authorize the use of United States Armed Forces pursuant to United Nations Security Council Resolution 678.

Whereas the Government of Iraq without provocation invaded and occupied the territory of Kuwait on August 2, 1990;[1]

Whereas both the House of Representatives (in H.J. Res. 658 of the 101st Congress) and the Senate (in S. Con. Res. 147 of the 101st Congress) have condemned Iraq's invasion of Kuwait and declared their support for international action to reverse Iraq's aggression;

Whereas, Iraq's conventional, chemical, biological, and nuclear weapons and ballistic missile programs and its demonstrated willingness to use weapons of mass destruction pose a grave threat to world peace;

Whereas the international community has demanded that Iraq withdraw unconditionally and immediately from Kuwait and that Kuwait's independence and legitimate government be restored;

---

[1] 50 USC 1541 note.

Whereas the United Nations Security Council repeatedly affirmed the inherent right of individual or collective self-defense in response to the armed attack by Iraq against Kuwait in accordance with Article 51 of the United Nations Charter;

Whereas, in the absence of full compliance by Iraq with its resolutions, the United Nations Security Council in Resolution 678 has authorized member states of the United Nations to use all necessary means, after January 15, 1991, to uphold and implement all relevant Security Council resolutions and to restore international peace and security in the area; and

Whereas Iraq has persisted in its illegal occupation of, and brutal aggression against Kuwait: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in the Congress assembled,[2]

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force Against Iraq Resolution".[3]

---

[2] Authorization for Use of Military Force Against Iraq Resolution.

[3] Kuwait, 50 USC 1541 note.

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.[4]

(a) AUTHORIZATION. -- The President is authorized, subject to subsection (b), to use United States Armed Forces pursuant to achieve implementation of Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.

(b) REQUIREMENT FOR DETERMINATION THAT USE OF MILITARY FORCE IS NECESSARY. -- Before exercising the authority granted in subsection (a), the President shall make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that --

(1) the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United Nations Security Council resolutions cited in subsection (a); and

(2) that those efforts have not been and would not be successful in obtaining such compliance.

(c) WAR POWERS RESOLUTION REQUIREMENTS. --

(1) SPECIFIC STATUTORY AUTHORIZATION. -- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization

---

[4] President, 50 USC 1541 note.

within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS. -- Nothing in this resolution supersedes any requirement of the War Powers Resolution.

SEC. 3. REPORTS TO CONGRESS.[5]

At least once every 60 days, the President shall submit to the Congress a summary on the status of efforts to obtain compliance by Iraq with the resolutions adopted by the United Nations Security Council in response to Iraq's aggression.

Approved 14, 1991.

LEGISLATIVE HISTORY -- H.J. Res. 77 (S.J. Res. 2):

CONGRESSIONAL RECORD, Vol. 137 (1991):

Jan 12, S.J. Res. 2 considered and passed Senate H.J. Res. 77 considered and passed House and Senate.

---

[5] President. 50 USC 1541 note.

SUPREME COURT, U.S.

No. 92-1504

In the Supreme Court of the United States

OCTOBER TERM, 1992

MITRA KOOHI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT V. ZENER
JEFFREY CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The court of appeals affirmed the dismissal of damage claims arising out of civilian deaths allegedly caused by defective military weapons systems and operational negligence of the *U.S.S. Vincennes* during combat with Iranian surface vessels. The question presented is whether the United States can be held liable in damages for those actions despite the Federal Tort Claims Act exception for "[a]ny claim arising out of the combatant activities of the military or naval forces * * * during time of war," 28 U.S.C. 2680(j), on the ground that Congress had not formally declared war against Iran at the time of the military's allegedly tortious conduct.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Baker v. *Carr*, 369 U.S. 186 (1962)	9
Bareford v. *General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) cert. denied, 113 S. Ct. 1843 (1993)	16
Berkovitz v. *United States*, 486 U.S. 531 (1988)	14
Boyle v. *United Technologies Corp.*, 487 U.S. 500 (1988)	18
Farnsworth Cannon, Inc. v. *Grimes*, 635 F.2d 268 (4th Cir. 1980)	16
Feres v. *United States*, 340 U.S. 135 (1950)	18
Hamilton v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919)	12
Navios Corp. v. *The Ulysses II*, 161 F. Supp. 932 (D. Md.), aff'd, 260 F.2d 959 (4th Cir. 1958)	13
New York Life Ins. Co. v. *Bennion*, 158 F.2d 260 (10th Cir. 1946)	13
New York Life Ins. Co. v. *Durham*, 166 F.2d 874 (10th Cir. 1948)	13
Sea-Land Service, Inc. v. *United States*, 919 F.2d 888 (3d Cir. 1990), cert. denied, 111 S. Ct. 2235 (1991)	13-14
The Paquete Habana, 175 U.S. 677 (1900)	12
Totten v. *United States*, 92 U.S. 105 (1876)	16
United States v. *Reynolds*, 345 U.S. 1 (1953)	8, 15, 16
United States v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)	14
Weston v. *Lockheed Missiles & Space Co.*, 881 F.2d 814 (9th Cir. 1989)	16

Case—Continued: Page

Zuckerbraun v. *General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) 16

Statutes:

Federal Tort Claims Act:
28 U.S.C. 1346(b) 7
28 U.S.C. 2671 *et seq.* 7
28 U.S.C. 2680(a) 13
28 U.S.C. 2680(d) 10
28 U.S.C. 2680(j) 9, 11, 12, 13
Public Vessels Act, 46 U.S.C. App. 781 *et seq.* 7, 10
46 U.S.C. App. 781 10

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1504

MITRA KOOHI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A29, is reported at 976 F.2d 1328. The opinion of the district court, Pet. App. A30-A34, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1992. A petition for rehearing was denied on December 16, 1992. Pet. App. A36-A37. The petition for a writ of certiorari was filed on March 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 3, 1988, an Iranian commercial airliner was shot down by the *U.S.S. Vincennes*, a guided missile cruiser on duty in the Persian Gulf. The plane crashed into the sea near the coast of Iran, resulting in the death of everyone aboard. Petitioners, who assert that they are heirs of the decedents, seek damages for the allegedly wrongful death of the airline passengers and crew.

The *U.S.S. Vincennes* was dispatched to the Persian Gulf during the so-called "tanker war" between Iran and Iraq.[1] Iraq had attacked Iran in September of 1980 in an attempt to resolve by force a boundary dispute between the two countries. Shortly thereafter, Iraq began attacking ships carrying Iranian oil. In 1984, Iran retaliated in kind and attacked ships calling at Arab ports in the Gulf.

In August of 1986, Iran concentrated its attacks on Kuwaiti ships and other ships calling at Kuwaiti ports. The United States, in response to a request from Kuwait, thereafter permitted qualifying Kuwaiti tankers to be registered under the U.S. flag, a step that would bring them under U.S. naval protection. Additional U.S. naval forces, including the

---

[1] Our description of historical events leading up to the destruction of Iran Air Flight 655 is based on materials compiled by the Congressional Research Service and the Defense Department's investigation of the matter. The court of appeals took judicial notice of these events, pointing out that they are a matter of historical record, are supported by documentation in the district court record, see C.A. Excerpts of Record (E.R.) Tab 4, Exh. A; *id.* Tab 6, Exh. 1, App. E, and are beyond reasonable dispute. Pet. App. A9 n.1.

Vincennes, were then moved into the Persian Gulf to deter attacks on U.S.-flagged shipping and to further the United States' declared policy of bringing an end to the war between Iran and Iraq.

In the months that followed, U.S. naval forces operating in the Persian Gulf were involved in a number of hostile incidents with the military forces of both Iran and Iraq. On May 17, 1987, an Iraqi warplane launched a missile attack on the *U.S.S. Stark*, killing 37 crewmen and wounding 21. On September 21, Iranian landing craft were observed laying mines near U.S. naval forces sailing in international waters. Two U.S. helicopters opened fire, disabling one of the vessels and killing some of the crew. On October 8, Iranian gunboats fired at a U.S. helicopter. Three helicopters returned fire, sinking one of the gunboats. On October 16, an Iranian surface-to-surface missile struck a U.S.-flagged tanker off the Kuwaiti coast, injuring 18 seamen, including the U.S. captain. The United States responded by destroying an oil platform used by Iran as a base for speedboat attacks on Gulf shipping. On April 14, 1988, a U.S. guided missile frigate struck a mine and was extensively damaged. The United States responded by destroying three Iranian oil platforms, sinking or damaging six Iranian naval vessels during the attack. See Pet. App. A10.

On the morning of July 3, 1988, 13 small Iranian gunboats challenged merchant shipping sailing near the *U.S.S. Montgomery*. The *Vincennes* was ordered to the area to support the *Montgomery* and launched a helicopter to reconnoiter the scene. The helicopter was fired on. The *Montgomery* and the *Vincennes*

headed toward the Iranian gunboats, which then maneuvered in a manner perceived to threaten the ships. The *Vincennes* and *Montgomery* engaged several of the Iranian ships, exchanging gunfire at close range and maneuvering for position at high speed.

Four minutes later, Iran Air Flight 655 took off from the commercial-military airport at Bandar Abbas in Iran and headed on a flight path that would carry it directly toward the *Vincennes*. The flight was immediately detected by the *Vincennes'* radar. Although the plane was emitting transponder signals identifying it as a civilian airliner, the crew of the *Vincennes* believed that the transponder signals it received were associated with a military aircraft. As a result, the *Vincennes* mistakenly identified Flight 655 as an Iranian F-14. The *Vincennes* and the *U.S.S. Sides* issued a series of warnings on military and civil international air distress channels. Flight 655, however, did not respond.

At a range of between 12 and 15 nautical miles, several officers aboard the *Vincennes* reported that the plane was descending in altitude and increasing in speed—changes that gave Flight 655 the appearance of maneuvering for attack. Those reports were incorrect, but the erroneous information was passed on to the *Vincennes'* captain. At 6:54 a.m., after Flight 655 had approached within approximately nine nautical miles, the *Vincennes* launched two missiles and destroyed the airliner.

In the post-accident investigation, the captain of the *Vincennes* reported that the following factors influenced his decision to shoot down the on-coming

plane: (1) the *Vincennes* crew reported that the plane was emitting transponder signals associated with an F-14; (2) the plane had departed from an airfield that previously had been used by Iranian F-14s; (3) the *Vincennes* crew reported that the plane had maneuvered into an attack profile and was closing rapidly; (4) the *Vincennes* was then exchanging fire with Iranian gunboats, and Iranian fighters had supported a naval attack on U.S. vessels the previous April; and (5) visual identification of the plane was not feasible. E.R. Tab 6, Exh. 1, at E47-E48.

The United States government concluded that the *Vincennes* had acted in justifiable self-defense, in accordance with appropriate procedures for protecting military personnel and well-accepted norms of international conduct. In a letter to Congress, President Reagan stated:

> The actions of U.S. Forces in response to being attacked by Iranian small boats were taken in accordance with our inherent right of self-defense, as recognized in Article 51 of the United Nations Charter, and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief.

Letter to the Congress (July 4, 1988), E.R. Tab 4, Exh. C.

A subsequent White House statement elaborated:

> The responsibility for this tragic incident, and for the deaths of hundreds of thousands of other innocent victims as a result of the Iran-Iraq war, lies with those who refuse to end the conflict. A particularly heavy burden of responsibility rests

time of the incident. *See* Petition at 18-20. In addition, they quote extensively from a letter to a magazine written by David Carlson, a Navy officer who was not on the Vincennes at the time of the incident, *in support of the contention that the Persian Gulf was* not "one giant area of military activity." *See id.* at 9-10.[5] Petitioners thus characterize the activities of the United States military in the Persian Gulf as nothing more than a "police action skirmish" (*id.* at 15), and state that the Vincennes faced only "a minor skirmish between vessels lasting for a brief period." *Id.* at 17. However, notwithstanding Mr. Carlson's "minority view," the judicially noticeable facts contained in the record clearly reflect a prolonged period of significant military activity in the Persian Gulf preceding the incident at issue, and fully support the Ninth Circuit's decision.[6] In addition, such factual disputes are irrelevant to whether the Ninth Circuit applied the correct legal standard to the facts, and do not warrant the granting of a writ of certiorari.[7]

Petitioners boldly assert that the Ninth Circuit's decision "is in conflict with all prior decisions of United States Courts dealing

---

[5] Although Petitioners represent that this article is "part of the record" (Pet. at 9), neither court below took judicial notice of the article or its contents. In addition, the author of the article expressly acknowledged that his opinions were "the minority view." Pet. App. at A-79.

[6] A detailed partial chronology of the military activities in the Persian Gulf preceding the July 3, 1988 incident is contained in Appendix A hereto. The Ninth Circuit noted that the events at issue herein "are a matter of historical record, are supported by documentation in the district court, and are . . . beyond reasonable dispute." Accordingly, the court took judicial notice of these facts. *Koohi*, 976 F.2d at 1330 n.1. The district court took judicial notice of certain facts, pursuant to requests by all parties. *See* Pet. App. at A-31 and 32. This Court may also take judicial notice of these facts. *See Rautenberg v. United States Dist. Ct.*, 112 S. Ct. 1704, 1704-75 (1992); *Nat'l Fire Ins. Co. v. Thompson*, 281 U.S. 331, 336 (1930).

[7] Pursuant to Sup. Ct. R. 15.1, Respondents bring to the Court's attention, in Appendix B hereto, several additional factual inaccuracies contained in the Petition.

with this issue and in conflict with fundamental international law." Petition at 12. This claimed "conflict" arises only from Petitioners' mistaken assumption that the Ninth Circuit purported to define "war" for all purposes, including "international law." *Id.* at 12 and 14. However, the Ninth Circuit's decision *only* interprets the phrase "time of war" as it appears in a single federal statute for the sole purpose of deciding the narrow domestic tort law issue before it. Petitioners do not cite a *single* case interpreting Section 2680(j), much less one that is in any manner inconsistent with the Court of Appeals' construction of that statute. Instead, Petitioners repeatedly misconstrue the Ninth Circuit's opinion and then argue that the opinion, so misconstrued, contains errors warranting this Court's review.

Thus, Petitioners argue that the Ninth Circuit "has interpreted [Section 2680(j)] to *exclude* 'in time of war' from the exemption ...." Petition at 12 (emphasis added). This is refuted by the opinion itself. The Ninth Circuit did not "exclude" the phrase "time of war," but instead interpreted that phrase to apply to a complex situation involving extensive commitment of military equipment and personnel, combatant activities and several other indicia of war, "at least for purposes of domestic tort law." *See* 976 F.2d at 1335.

Petitioners implicitly concede that a "time of war" may exist although there has been no official declaration by the Congress, arguing only that "some official determination of some type" by the government is needed. Petition at 12. *See also id.* at 16 ("[s]ome public act has always been required").[8] Petitioners

---

[8] Courts have repeatedly held that a formal declaration of war by Congress is not required under Section 2680(j). *See Saltany v. Reagan*, 702 F. Supp. 319, 321 n.4 (D.D.C. 1988) (dismissal of claims by Libyan citizens against the President arising out of a 1986 air strike, under FTCA exemptions, including Section 2680(j)), *aff'd*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *Roiko v. Abrams*, 338 F. Supp. 46, 47-48 (D. Conn. 1971) (hostilities in Southeast Asia constituted a "time of war" under Section 2680(j) despite absence of a formal declaration by Congress), *aff'd*, 455 F.2d 922 (2d Cir. 1972); *Morrison v. United States*, 316 F. Supp. 78, 79 (M.D. Ga. 1970) (same).

erroneously claim that the Ninth Circuit did not require any such "official determination," again based upon Petitioners' mischaracterization of the court's decision. In fact, however, the Ninth Circuit stated that, in order for a "time of war" to exist under Section 2680(j), there must be "a deliberate decision by the executive branch" resulting in the engagement of armed forces. *Koohi,* 976 F.2d at 1335. The Ninth Circuit then determined that such a decision had been made herein. *Id.* (the "United States' involvement in naval combat while the Iran-Iraq war was in progress was the result of a deliberate decision on the part of the executive branch to engage in hostile military activities vis-a-vis Iran in order to protect Gulf shipping").[9]

Contrary to Petitioners' assertion (Petition at 21), the record fully supports the Ninth Circuit's conclusion that the Vincennes' actions were the result of a long series of "deliberate actions" by the Executive. For example, Executive Order No. 12170 (1979), initially signed by President Carter, found that "the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States." This order was extended in each year preceding the incident, including the extension by President Reagan on November 10, 1987. *See* Request of Defendant the United States to Take Judicial Notice, submitted in support of the motions below to dismiss the complaints (hereinafter the "Request to Take Judicial

---

[9] Petitioners acknowledge that "[w]ar is a political act which under all prior cases needed to be determined either by the Legislative [sic] or the Executive under an official pronouncement of some nature." Pet. at 16. This statement illustrates that the issues raised herein are non-justiciable political questions. It also conflicts with Petitioners' attempt to demonstrate the "neutrality" of the United States in the Iran-Iraq war simply by quoting from a judicial opinion. *See* Pet. at 13-14, *quoting Lowry v. Reagan,* 676 F. Supp 333, 336 n.13 (D.D.C. 1987). Moreover, just as war is a political act, a qualitative assessment of the sufficiency of the means and methods by which the Executive and Congress effect, implement and sustain war is also a political question. *See Orlando v. Laird,* 433 F.2d 1039, 1043 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971); *Lowry,* 676 F. Supp. at 337 (dismissing action under political question doctrine).

Notice"), Exh. A. *See also* Exec. Order No. 12613, *reprinted in* 3 C.F.R. 256 (1987) (signed by President Reagan, finding that "the Government of Iran is actively supporting terrorism . . . [and] has conducted aggressive and unlawful military action against U.S.-flag vessels and merchant vessels of other non-belligerent nations").

Beginning in early 1987, statements by the President and other members of the Executive branch established the United States' policy to maintain the free flow of oil in the Persian Gulf through the use of the United States military, including the reflagging and escort of oil tankers through the Gulf. For example, in January and February 1987, President Reagan reiterated the United States' determination to maintain the flow of oil through the Gulf. Request to Take Judicial Notice, Exh. A. In March 1987, the United States publicly announced plans to reflag eleven Kuwaiti oil tankers, and, in July 1987, the first two such tankers were escorted into the Gulf by Navy vessels. *Id.*

Other pronouncements confirm this "deliberate decision" of the Executive branch. For example, on May 19, 1987, the Assistant Secretary of State stated that, "the United States Government views the continuation of this conflict [in the Persian Gulf], as well as its potential expansion, as a direct threat to our interests." *Assistant Secretary Murphy's Statement,* 87 Dep't of State Bulletin at 60 (July 1987). On May 29, 1987, President Reagan, in an outline of United States policy, stated, *inter alia,* that the United States "must maintain an adequate presence [in the Persian Gulf] to deter and, if necessary, to defend ourselves against any accidental attack or against any intentional attack." *U.S. Policy in the Persian Gulf,* 23 Weekly Comp. Pres. Doc. 601 (June 1, 1987). Moreover, President Reagan made two reports to Congress on events in the Gulf, on October 10, 1987 and October 20, 1987, "consistent with the War Powers Resolution." *See Communications From the President of the United States,* H.R. Doc. No. 113, 100th Cong., 1st Sess. 2 (1987); H.R. Doc. No. 120, 100th Cong., 1st Sess. 1 (1987).[10]

---

[10] In addition, members of both houses of Congress manifested their belief that a state of war existed in the Gulf through repeated efforts to

Petitioners assert that "time of war" should be interpreted "in light of the existing law at the time of its enactment in 1946" (Petition at 15), and that "at the time Congress enacted the [FTCA] it was clearly the law that determination of 'war' required some official act of government." *Id.* at 17. Petitioners' inability to cite any authority in support of this assertion is not surprising, because the statutory construction analysis used by the Ninth Circuit — to interpret a statute in its modern context — is widely accepted and has been adopted by this Court. *See, e.g., Taylor v. United States,* 495 U.S. 575, 596 (1990) (Court rejected the application of a maxim of statutory construction — "the rule of lenity" — which would cause an interpretation "at odds with the generally accepted contemporary meaning of a term"); *Consumer Products Safety Commission v. GTE Sylvania,* 447 U.S. 102, 108-09 (1980) (Court looked to common usage of the statutory language as the starting point for its interpretation). Moreover, as previously noted, this argument is inapposite, because the Ninth Circuit did require an official act of government — a deliberate decision on the part of the Executive.

No case cited by Petitioners conflicts with the Ninth Circuit's interpretation of Section 2680(j). That statute was not even at issue in *Navios v. The Ulysses II,* 161 F. Supp. 932 (D. Md. 1958), *New York Life Ins. Co. v. Durham,* 166 F.2d 874 (10th Cir. 1948) or *New York Life Ins. Co. v. Bennion,* 158 F.2d 260 (10th Cir. 1946). Rather, each of those cases involved the interpretation of contracts between private parties which included

---

invoke the War Powers Resolution, 50 U.S.C. § 1541, et seq. (1993). *See, e.g.,* H.R.J. Res. 295 and 296, 100th Cong., 1st Sess. (May 28, 1987); S. Res. 1343, 100th Cong., 1st Sess. (June 9, 1987); H.R.J. Res. 310, 100th Cong., 1st Sess. (June 10, 1987); S.J. Res. 194, 100th Cong., 1st Sess. (October 1, 1987); H.R.J. Res. 387, 100th Cong., 1st Sess. (October 22, 1987); S.J. Res. 217, 100th Cong., 1st Sess. (November 10, 1987). Moreover, on August 7, 1987, 110 members of Congress sued the President in an attempt to invoke the War Powers Resolution after three United States warships entered the Persian Gulf on July 22, 1987 and United States forces fired on an Iranian ship laying mines on September 21, 1987. The case was later dismissed based on the political question doctrine and the court's equitable discretion. *See Lowry,* 676 F. Supp. at 337.

a clause regarding war. In any event, these cases are consistent with the Ninth Circuit's holding that no formal declaration of war is required before a state of war may exist and that a phrase must be interpreted within the context in which it appears.

For example, the court in *Navios* stated that the clause at issue should be interpreted as it would be understood by businessmen engaged in the shipping industry (*Navios,* 161 F. Supp. at 941), and that, either under that standard or under the formal rules of international law, a statement by the president of Egypt constituted a declaration of war (*id.* at 943).[11] The issue in *Durham* was the meaning of a clause in an insurance policy restricting coverage for the death of the insured while in the armed forces of a country engaged in war. *Durham,* 166 F.2d at 875. The court stated that private parties may contract as to the meaning of the term "engaged in war," that courts have the duty to construe the term according to that intent and that the parties might contemplate that the country would be engaged in a war that was not politically determined or formally recognized. *Id.* at 876. *Bennion* also involved the interpretation of an insurance policy, which excluded coverage from death resulting from war or any act incident thereto. *Bennion,* 158 F.2d at 261. That court stated, *inter alia,* that "[t]o say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts. We cannot believe that the courts are deprived of the power to deal with this vital question in a practical and realistic sense." *Id.* at 264. The court ruled that a war existed after the bombing of Pearl Harbor but prior to the formal declaration of war by Congress. *Id.*

Petitioners, without elaboration in the body of the Petition, also half-heartedly challenge the Ninth Circuit's dismissal of the claims against the Contractor Defendants on preemption grounds based on the immunity afforded the United States under Section

---

[11] In addition, the definitions cited by the *Navios* court (161 F. Supp. at 939 n.6), which Petitioners claim define war as a formal pronouncement by a sovereign state (Pet. at 18), were actually examples of dictionary definitions of the phrase "declaration of war," not "war." This bootstrapping argument thus provides no support to Petitioners.

2680(j). However, Petitioners do not articulate any specific challenge to the Ninth Circuit's preemption analysis, let alone contend that the analysis was contrary to established legal principles.

In fact, the Ninth Circuit's preemption holding is consistent with established law. As the court determined, one of the purposes of Section 2680(j) is "to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." 976 F.2d at 1337. This determination is consistent with the analyses used by other courts facing analogous situations. *See, e.g., In re Agent Orange Product Liability Litigation,* 818 F.2d 145, 150 (2d Cir. 1987) ("To expose private companies generally to lawsuits for injuries arising out of the deliberately risky activities of the military would greatly impair the procurement process and perhaps national security itself."), *cert. denied,* 484 U.S. 1004 (1988); *Tozer v. LTV Corp.,* 792 F.2d 403, 406 (4th Cir. 1986) (warning of the "danger in transporting the rubric of tort law and products liability to a military setting and military technology. . . . What would pose an unreasonable risk to the safety of civilians might be acceptable — or indeed necessary — in light of the military mission of [a weapon]"), *cert. denied,* 487 U.S. 1233 (1988).[12]

Accordingly, the Ninth Circuit's conclusion that preemption was proper because imposition of liability on the Contractor Defendants "would create a duty of care where [Section 2680(j)] is intended to ensure that none existed" (976 F.2d at 1337), is consistent with the approach taken by this Court in *Boyle v. United Technologies Corp.,* 487 U.S. 500 (1988), upon which the Ninth Circuit relied. *Id.*

---

[12] *See also Harduvel v. General Dynamics Corp.,* 878 F.2d 1311, 1322 (11th Cir. 1989) ("Although the [government contractor] defense may sometimes seem harsh in its operation, it is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense") (Powell, J.), *cert. denied,* 494 U.S. 1030 (1990).

CONCLUSION

The Petition does not identify any significant issue of federal law implicated by the Ninth Circuit's interpretation of Section 2680(j) and its application herein, and Petitioners have cited no case with which the opinion below is in conflict. Petitioners' disagreement with the Ninth Circuit's conclusion that the record in this matter provides a sufficient basis to invoke Section 2680(j) is not an appropriate basis for issuance of a writ of certiorari. Therefore, Respondents respectfully urge that the Petition be denied.

Dated: May 14, 1993

Respectfully submitted,

MATTHEW D. POWERS*
ANN E. DIBBLE
WEIL, GOTSHAL & MANGES
Silicon Valley Office
2882 Sand Hill Rd., Suite 280
Menlo Park, California 94025
Telephone: (415) 926-6200

By: MATTHEW D. POWERS
Attorneys for Respondents
General Electric Company,
GE Aerospace and *RCA Corp.*

JAMES K. MEGUERIAN
D'ANCONA & PFLAUM
30 N. LaSalle St., Suite 2900
Chicago, Illinois 60602
Telephone: (312) 580-2132

By: JAMES K. MEGUERIAN
Attorneys for Respondent
Syscon Corporation

*Attorney of Record

ELLIOT E. POLEBAUM
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 639-7067

By: ELLIOT E. POLEBAUM
Attorneys for Respondent
Computer Sciences
Corporation

ROBERT J. STUMPF
BRONSON, BRONSON & MCKINNON
505 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 986-4200

By: ROBERT J. STUMPF
Attorneys for Respondent
Varian Associates, Inc.

APPENDIX A[1]

5/17/87: An Iraqi Mirage F-1 fires two Exocet missiles at the U.S.S. Stark, killing 37 U.S. Navy crewmen and wounding 21 others.

6/11/87: A bill is introduced in the House of Representatives authorizing "hazardous duty" payments to U.S. military personnel in the Gulf.

7/9/87: An Iranian gunboat attacks a U.S.-owned, Liberian-flagged tanker near Kuwait.

7/24/87: A re-flagged Kuwaiti tanker being escorted into the Gulf by U.S. Navy vessels hits a mine.

8/10/87: A U.S. F-14 aircraft fires two air-to-air missiles at an Iranian F-4 that is perceived to be threatening a U.S. surveillance aircraft.

8/21/87: An Iranian warship approaches a U.S.-led convoy after the U.S.S. Kidd had fired warning shots across the bow of two sailing vessels, but is deterred by the intervention of a U.S. frigate and helicopters.

8/26/87: The Department of Defense announces that it will make "imminent danger" payments to U.S. military personnel stationed in the Gulf.

9/21/87: U.S. helicopters fire machine guns and rockets at an Iranian ship dropping mines into the Gulf, and capture 26 Iranian crewmen who are later returned via the International Red Cross.

9/24/87: The Senate approves an amendment to the Defense Authorization Bill, S. 1174, that states that the Navy would be justified in sinking any Iranian ship attacking a Navy vessel or any ship carrying U.S. citizens.

---

[1] Unless otherwise noted, the following chronology is based on the recitation of events contained in the Congressional Research Service's *CRS Report for Congress*, Pub. No. 88-129 F, *The Persian Gulf, 1987: A Chronology of Events* (1988), attached as Exhibit A to the Request to Take Judicial Notice below.

10/3/87: Four U.S. warships confront 60 armed Iranian speed boats which have been launched against a Saudi Arabian offshore oil field.

10/8/87: Three U.S. military helicopters fire on four Iranian gunboats after the gunboats fired on the helicopters.

10/15/87: An Iranian Silkworm missile hits a U.S.-owned, Liberian-flagged tanker anchored off Kuwait.

10/16/87: Another Iranian Silkworm hits a Kuwait-owned, U.S.-flagged tanker.

10/19/87: Four U.S. destroyers destroy an Iranian oil platform that has been used as a base to launch Iranian speed boat attacks in the Gulf.

11/1/87: A U.S. frigate fires on two speedboats and a dhow that approached a U.S. supply ship as it was escorted out of the Gulf.

4/14/88: The U.S.S. Roberts strikes an Iranian mine in the Gulf.[2]

4/18/88: In response to the attack on the U.S.S. Roberts, President Reagan orders U.S. forces to attack two Iranian oil platforms. While these events are happening, U.S. vessels and military forces are further attacked by Iranian boats, navy vessels, a helicopter and F-14 jets. U.S. forces respond, sinking some Iranian boats and vessels and firing at the F14s.[3]

7/2/88: The U.S.S. Montgomery responds to a distress signal from a Danish tanker under attack by Iranian boats, firing a warning shot which ends the attack.[4]

---

[2] *Letter to the Speaker of the House and the President Pro Tempore of the Senate on the United States Military Strike in the Persian Gulf,* 24 Weekly Comp. Pres. Doc. 493 (April 19, 1988).

[3] *Id.*

[4] Request to Take Judicial Notice, Exh. B.

APPENDIX B

Pursuant to Supreme Court Rule 15.1, Respondents identify the following additional misstatements of fact set forth in the Petition:

1. The opinion below refers to these international passengers as 'members of the enemy military or civilian populations' and partially justifies their death on this ground.

Pet. at 4.

The Ninth Circuit made no such determination, nor was it necessary to do so under the court's analysis, which concerned only whether the passengers were "those against whom force [was] directed as a result of authorized military action." *Koohi*, 976 F.2d at 1335.

2. The aircraft, contrary to the misapprehension of the court below, did not fail to communicate its civilian status to the crew of the Vincennes.

Pet. at 5.

The record below clearly supports the finding of the Ninth Circuit. The crew of the Vincennes issued at least three warnings to the aircraft on emergency frequencies. However, no response to any of these warnings was made by the aircraft, despite the specific direction of Iran Air for the crew to monitor the emergency frequency at all times while operating in the Persian Gulf area. *See, e.g.*, Pet. App. at A-50, 51 and 53. (Respondents also note that additional evidence which refutes Petitioners' statement may be found in portions of the ICAO Report of Investigation that were omitted from Petitioners' Appendix, but were included in the record below. *See, e.g.*, Request to Take Judicial Notice, Exh. B, Sections 2.10.8, 2.12.2 and 3.1.14.

3. No meaningful warnings were given to the aircraft basically because the U.S.S. Vincennes was unfortunately not in radio communication with the civilian air network. The U.S.S Vincennes transmitted a series of messages on UHF military guard frequency, 243MHz, a radio frequency not available on international airliners. A few incomprehensible transmissions were made

> by the U.S.S Vincennes on 121.6MHz, the international guard frequency.

Pet. at 5-6.

In fact, the Vincennes issued three challenges to the aircraft on a non-military frequency which contained sufficient information for the crew to identify the target of the challenge. In addition, the U.S.S. Sides issued another challenge on the same frequency which should also have been clearly recognized. *See* Pet. App. at A-53 and 54.

> 4. In briefing below, the United States admitted this duty [of ordinary care toward non-belligerents, including civilian commercial international aviation or civilian commerce on the high seas].

Pet. at 15 & n.5.

The United States made no such admission, stating only that "the Vincennes had an obligation to avoid unwarranted loss of innocent civilian life." Brief of Appellee United States at 26.

> 5. The court below believed that family survivors of passengers have received *ex gratia* payments. Some have, but very few, about ten (10%) percent and in very modest amounts. *Ex gratia* payments were promised in 1988, but most of the plaintiffs herein have received nothing.

Pet. at 23.

Petitioners' attempt to insert the issue of *ex gratia* payments is unavailing. First, as the record reflects and Petitioners acknowledge in the above statement, the United States has offered to make such payments. See Request to Take Judicial Notice, Exh. E. More importantly, this issue is irrelevant to the questions presented by the Petition and played no part in the decision of the Ninth Circuit.

No. 92-1504

(3)

Supreme Court, U.S.
FILED
MAY 17 1993
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

MITRA KOOHI, IMAN KOOHI, minor daughter;
KOSAR KOOHI, minor daughter; HASSAN ALMASSI;
IRAN AIR FLIGHT 655,
Petitioners,

VS.

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF NAVY,
Respondents,

ELIZABETH H. BAILEY, as the personal representative, et al.,
Petitioners,

VS.

VARIAN ASSOCIATES, INC.; GENERAL ELECTRIC CO.;
GE AEROSPACE; RCA CORP.; HARNISCHFEGER INDUSTRIES;
SYSCON CORP.; COMPUTER SCIENCES CORPORATION,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MATTHEW D. POWERS*
ANN E. DIBBLE
WEIL, GOTSHAL & MANGES
Silicon Valley Office
2882 Sand Hill Rd., Suite 280
Menlo Park, California 94025
Telephone: (415) 926-6200
Attorneys for Respondents
General Electric Co.,
GE Aerospace and RCA Corp.

*Attorney of Record

(Additional Counsel Listed on Inside Front Cover.)

BEST AVAILABLE COPY

BOWNE OF PALO ALTO • 1800 EMBARCADERO ROAD • PALO ALTO CA 94303-3308 • (415) 858-1900

JAMES K. MEGUERIAN
D'ANCONA & PFLAUM
30 N. LaSalle St., Suite 2900
Chicago, Illinois 60602
Telephone: (312) 580-2132
Attorneys for Respondent
Syscon Corporation

ELLIOT E. POLEBAUM
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 639-7067
Attorneys for Respondent
Computer Sciences Corp.

ROBERT J. STUMPF
BRONSON, BRONSON & MCKINNON
505 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 986-4200
Attorneys for Respondent
Varian Associates, Inc.

QUESTION PRESENTED FOR REVIEW

Whether the petition for writ of certiorari should be denied where there is no conflict between the Ninth Circuit's decision below and Supreme Court precedent, no such conflict with decisions of other courts of appeals, and where the Ninth Circuit applied established rules of statutory construction to a unique set of facts in dismissing negligence actions on the grounds that they are barred under and preempted by the Federal Tort Claims Act?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
CONCLUSION	13
APPENDIX A	A-1
APPENDIX B	B-1

TABLE OF AUTHORITIES

Cases

Page

Bareford v. General Dynamics Corp., 973 F.2d 1138 (5th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3714 (April 19, 1993) 3
Boyle v. United Technologies Corp., 487 U.S. 500 (1988). 12
Consumer Products Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980) 10
Feres v. United States, 340 U.S. 135 (1950) 5
General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1937) 4
Harduvel v. General Dynamics Corp., 878 F.2d 1311 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990) 12
In re Agent Orange Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). 12
Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992) . . *passim*
Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) 8, 10
Morrison v. United States, 316 F. Supp. 78 (M.D. Ga. 1970) 7
National Fire Insurance Co. v. Thompson, 281 U.S. 331 (1930) 6
Navios v. The Ulysses II, 161 F. Supp. 932 (D. Md. 1958) 10, 11
Nejad v. United States, 724 F. Supp. 753 (C.D. Cal. 1989) 3
New York Life Insurance Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946).....10, 11
New York Life Insurance Co. v. Durham, 166 F.2d 874 (10th Cir. 1948).....10, 11
Orlando v. Laird, 433 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971) 8
Rautenberg v. United States District Court, 112 S. Ct. 1704 (1992) 6
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 5
Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), *aff'd*, 455 F.2d 922 (2d Cir. 1972)..... 7
Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988), *aff'd*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) 7
Taylor v. United States, 495 U.S. 575 (1990) 10

TABLE OF AUTHORITIES

CASES

	Page
Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988)	12
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)	3
Zuckerbraun v. General Dynamics Corp., 935 F.2d 544 (2d Cir. 1991)	3

Statutes and Rules

Federal Tort Claims Act, 28 U.S.C. § 2671, et seq. (1993)	*passim*
Death on the High Seas Act, 46 App. U.S.C. § 761, et seq. (1993)	2
Public Vessels Act, 46 App. U.S.C. § 781, et seq. (1993)	2, 3
War Powers Resolution, 50 U.S.C. § 1541, et seq. (1993)	9, 10
Supreme Court Rules	
Rule 10	4
Rule 15.1	6

Other Authorities

Assistant Secretary Murphy's Statement, 87 Dep't of State Bulletin at 60 (July 1987)	9
Communication From the President of the United States, H.R. Doc. No. 113, 100th Cong., 1st Sess. 2 (1987)	9
Communication From the President of the United States, H.R. Doc. No. 120, 100th Cong., 1st Sess. 1 (1987)	9
Executive Order No. 12170 (1979)	8
Executive Order No. 12613, *reprinted in* 3 C.F.R. 256 (1987)	9
H.R.J. Res. 295 and 296, 100th Cong., 1st Sess. (May 28, 1987)	10
H.R.J. Res. 310, 100th Cong., 1st Sess. (June 10, 1987)	10
H.R.J. Res. 387, 100th Cong., 1st Sess. (October 22, 1987)	10
S.J. Res. 194, 100th Cong., 1st Sess. (October 1, 1987)	10
S.J. Res. 217, 100th Cong., 1st Sess. (November 10, 1987)	10
S. Res. 1343, 100th Cong., 1st Sess. (June 9, 1987)	10
U.S. Policy in the Persian Gulf, 23 Weekly Comp. Pres. Doc. 601 (June 1, 1987)	9

No. 92-1504

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

MITRA KOOHI, et al.,
Petitioners,

VS.

UNITED STATES OF AMERICA, et al.,
Respondents,

ELIZABETH H. BAILEY, as the personal representative, et al.,
Petitioners,

VS.

VARIAN ASSOCIATES, INC., et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This action arises from three consolidated wrongful death and personal injury actions brought against the United States and Respondents herein, four private manufacturers of various aspects of the Aegis Air Defense System (the "Aegis system"), which is deployed on the USS Vincennes and other United States naval vessels.[1] All three cases relate to an incident on July 3, 1988, in

[1] This Joint Brief is filed by respondents GENERAL ELECTRIC COMPANY, VARIAN ASSOCIATES, INC., SYSCON CORPO-

which Iran Air Flight No. 655 was downed by the USS Vincennes following hostile engagement with Iranian gunboats in the Persian Gulf. Petitioners claim to be the heirs of some of the deceased passengers and crew aboard the Iran Air flight.

In their First Amended Complaint against Respondents, Petitioners purported to assert claims for strict product liability, negligence and liability under the Death on the High Seas Act, 46 App. U.S.C. § 761, et seq. (1993). In their complaint against the United States, Petitioners purported to assert claims for negligence pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, et seq. (1993) (the "FTCA") or the Public Vessels Act, 46 App. U.S.C. § 781, et seq. (1993) (the "PVA").

On June 11, 1990, the United States District Court for the Northern District of California dismissed Petitioners' complaints. The court ruled that all claims raised non-justiciable political questions and also ruled, contrary to Petitioners' suggestion that the political question doctrine was the sole basis for dismissal (Petition at 6), that Petitioners' claims were barred by the state secrets doctrine. Petitioners' Appendix ("Pet. App.") at A-32, 33 and 34.

Petitioners appealed the district court's decision to the Court of Appeals for the Ninth Circuit. On October 8, 1992, the Ninth Circuit affirmed the dismissal of all three actions. *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992). The Ninth Circuit held that the claims against the United States were barred, and those

---

RATION and COMPUTER SCIENCES CORPORATION (hereinafter the "Contractor Defendants"). A complete list of all parties to the proceeding in the Ninth Circuit is contained in the Petition at iv-viii. Respondents list the following parent companies and subsidiaries which have issued shares to the public (except wholly owned subsidiaries): Computer Sciences Corporation; Harnischfeger Industries, Inc.; Varian Associates, Inc.; General Electric Company; Dart & Kraft Financial Corporation; GECC Financial Corporation; General Electric Capital Corporation; General Electric Capital Canada, Inc.; General Electric Credit International, N.V.; General Electric Financial Services, Inc.; General Electric Overseas Capital Corporation; Montgomery Ward Credit Corporation; Montgomery Ward & Co., Incorporated; CAMCO, Inc. (Canada).

against the private defendants were preempted, by the FTCA's preclusion of claims arising from "combatant activities . . . during time of war." *See* 28 U.S.C. Section 2680(j) ("Section 2680(j)"). Construing the term "time of war" in its modern context, the Ninth Circuit held that the activities of the Vincennes occurred during such a "time of war," even though no war had officially been declared by the United States Congress. *Koohi*, 976 F.2d at 1334. The appellate court decided that the "time of war" requirement in Section 2680(j) is satisfied, without a formal declaration of war by either Congress or the Executive, "when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with military forces of another nation. . . ." *Id.* The court stated that this construction was necessary to shield the United States from liability it never intended to assume. *Id.*

The Ninth Circuit also held that the PVA was subject to a similar exception, which likewise barred the claims against the United States. *Id.* at 1336. In addition, the court affirmed the dismissal of the claims against the Contractor Defendants because Section 2680(j) of the FTCA preempts common law tort actions such as those asserted by Petitioners against private defendants such as Respondents. *Id.*[2]

---

[2] In dictum, the Ninth Circuit disagreed with the district court's ruling that Petitioners' claims present non-justiciable political questions. 976 F.2d at 1331. The Ninth Circuit did not reach an alternative ground of dismissal relied upon by the district court below: the state secrets doctrine. This doctrine provides an independent basis for affirming the district court's judgment. *See, e.g., Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (affirming dismissal of similar claims based on state secrets doctrine), *cert. denied*, 61 U.S.L.W. 3714 (April 19, 1993); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (affirming dismissal of similar claims under state secrets doctrine); *Nejad v. United States*, 724 F. Supp. 753, 755-56 (C.D. Cal. 1989) (dismissing identical claims arising from the same incident on state secrets grounds). The existence of this alternative ground of affirmance is a further reason why the Petition should be denied. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)

On October 20, 1992, Petitioners filed a "Petition for Rehearing en Banc," which was denied on December 16, 1992. Pursuant to the Petition filed March 15, 1993, Petitioners now seek a writ of certiorari on the ground that the Ninth Circuit "decided a significant question of federal law which has not been, but should be settled by the Court." Petition at 12. Petitioners claim that the Ninth Circuit "lacked the authority" to interpret Section 2680(j) and to apply that statute to the claims asserted against the United States and Respondents. *Id.* at iii.

Petitioners do not identify any prior decision of this Court or of another court of appeals that conflicts with the Ninth Circuit's construction of Section 2680(j). Rather, Petitioners dispute the Ninth Circuit's finding that, under the unique facts of this case, a "time of war" existed at the time of the incident for purposes of Section 2680(j). Thus, none of the considerations supporting grant of a writ of certiorari is present herein, and the Petition should be denied. *See* Sup. Ct. R. 10.

REASONS FOR DENYING THE PETITION

The instant Petition presents nothing more than a disagreement over the Ninth Circuit's factual determination, based on the unique facts of this case, that the incident at issue arose in a "time of war," as that term is used in Section 2680(j). That issue does not merit review by this Court. *See General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1937) (granting a writ of certiorari "would not be warranted merely to review the evidence or inferences drawn from it"). The Petition does not implicate any matter of federal law sufficiently important to warrant review by this Court because: (1) the Ninth Circuit correctly applied Section 2680(j) to the unique facts of this case; (2) in reaching its decision, the Ninth Circuit applied accepted and settled methods of statutory construction in interpreting Section 2680(j); and (3) Petitioners admit that a "time of war" within the meaning of Section 2680(j) may exist, absent a

---

(party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals").

congressional declaration, where there is "some official determination of some type by either the Executive or the Legislative Branch" (Petition at 12), a standard that is applied in the Ninth Circuit's opinion and satisfied on the record below.

Moreover, as the Petition itself illustrates, there is no opinion of this Court or of any court of appeals interpreting Section 2680(j) which conflicts with the decision of the Ninth Circuit in this case. Indeed, the Ninth Circuit's interpretation of Section 2680(j) and its application to the so-called "tanker war" in the Persian Gulf was an issue of first impression for the court and one which has limited, if any, significance beyond Petitioners' claims. A grant of certiorari is unwarranted in such circumstances. *See Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955) ("special and important" issue supporting grant of writ of certiorari should reach "beyond the academic or the episodic").[3]

The issue on which Petitioners purportedly seek review is whether the Ninth Circuit erred in construing Section 2680(j) by determining that the acts of the Vincennes occurred during a "time of war."[4] *See, e.g.,* Petition at 4 ("Petitioners urge that . . . there is absolutely no basis for concluding that we were at war"). Thus, the bulk of the Petition is spent disputing the Ninth Circuit's factual determination that a "time of war" existed in the Persian Gulf at the time of the incident at issue. For example, Petitioners point to civil litigation currently being conducted against Iran, as well as the Iran-United States Claims Tribunal, as evidence that there could not have been a "time of war" at the

---

[3] Petitioners implicitly criticize *Feres v. United States,* 340 U.S. 135 (1950), chiding the "creativity" of the *Feres* court. Pet. at 23. Petitioners then argue that the Ninth Circuit's decision herein "extends" *Feres,* which held that military personnel on active duty may not sue the United States in negligence, and that "this extension is unwarranted by the wording of the statute even if the *Feres* doctrine is to be a permanent part of American law." *Id.* However, the Ninth Circuit did not base its holding on *Feres,* but, rather, on its interpretation of the meaning of Section 2680(j) and its application of that statute to the facts before it.

[4] Petitioners do not dispute that the actions of the Vincennes constituted "combatant activities" within the meaning of Section 2680(j).

time of the incident. *See* Petition at 18-20. In addition, they quote extensively from a letter to a magazine written by David Carlson, a Navy officer who was not on the Vincennes at the time of the incident, in support of the contention that the Persian Gulf was not "one giant area of military activity." *See id.* at 9-10.[5] Petitioners thus characterize the activities of the United States military in the Persian Gulf as nothing more than a "police action skirmish" (*id.* at 15), and state that the Vincennes faced only "a minor skirmish between vessels lasting for a brief period." *Id.* at 17. However, notwithstanding Mr. Carlson's "minority view," the judicially noticeable facts contained in the record clearly reflect a prolonged period of significant military activity in the Persian Gulf preceding the incident at issue, and fully support the Ninth Circuit's decision.[6] In addition, such factual disputes are irrelevant to whether the Ninth Circuit applied the correct legal standard to the facts, and do not warrant the granting of a writ of certiorari.[7]

Petitioners boldly assert that the Ninth Circuit's decision "is in conflict with all prior decisions of United States Courts dealing

---

[5] Although Petitioners represent that this article is "part of the record" (Pet. at 9), neither court below took judicial notice of the article or its contents. In addition, the author of the article expressly acknowledged that his opinions were "the minority view." Pet. App. at A-79.

[6] A detailed partial chronology of the military activities in the Persian Gulf preceding the July 3, 1988 incident is contained in Appendix A hereto. The Ninth Circuit noted that the events at issue herein "are a matter of historical record, are supported by documentation in the district court, and are . . . beyond reasonable dispute." Accordingly, the court took judicial notice of these facts. *Koohi*, 976 F.2d at 1330 n.1. The district court took judicial notice of certain facts, pursuant to requests by all parties. *See* Pet. App. at A-31 and 32. This Court may also take judicial notice of these facts. *See Rautenberg v. United States Dist. Ct.*, 112 S. Ct. 1704, 1704-75 (1992); *Nat'l Fire Ins. Co. v. Thompson*, 281 U.S. 331, 336 (1930).

[7] Pursuant to Sup. Ct. R. 15.1, Respondents bring to the Court's attention, in Appendix B hereto, several additional factual inaccuracies contained in the Petition.

with this issue and in conflict with fundamental international law." Petition at 12. This claimed "conflict" arises only from Petitioners' mistaken assumption that the Ninth Circuit purported to define "war" for all purposes, including "international law." *Id.* at 12 and 14. However, the Ninth Circuit's decision *only* interprets the phrase "time of war" as it appears in a single federal statute for the sole purpose of deciding the narrow domestic tort law issue before it. Petitioners do not cite a *single* case interpreting Section 2680(j), much less one that is in any manner inconsistent with the Court of Appeals' construction of that statute. Instead, Petitioners repeatedly misconstrue the Ninth Circuit's opinion and then argue that the opinion, so misconstrued, contains errors warranting this Court's review.

Thus, Petitioners argue that the Ninth Circuit "has interpreted [Section 2680(j)] to *exclude* 'in time of war' from the exemption . . . ." Petition at 12 (emphasis added). This is refuted by the opinion itself. The Ninth Circuit did not "exclude" the phrase "time of war," but instead interpreted that phrase to apply to a complex situation involving extensive commitment of military equipment and personnel, combatant activities and several other indicia of war, "at least for purposes of domestic tort law." *See* 976 F.2d at 1335.

Petitioners implicitly concede that a "time of war" may exist although there has been no official declaration by the Congress, arguing only that "some official determination of some type" by the government is needed. Petition at 12. *See also id.* at 16 ("[s]ome public act has always been required").[8] Petitioners

---

[8] Courts have repeatedly held that a formal declaration of war by Congress is not required under Section 2680(j). *See Saltany v. Reagan*, 702 F. Supp. 319, 321 n.4 (D.D.C. 1988) (dismissal of claims by Libyan citizens against the President arising out of a 1986 air strike, under FTCA exemptions, including Section 2680(j)), *aff'd*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *Rotko v. Abrams*, 338 F. Supp. 46, 47-48 (D. Conn. 1971) (hostilities in Southeast Asia constituted a "time of war" under Section 2680(j) despite absence of a formal declaration by Congress), *aff'd*, 455 F.2d 922 (2d Cir. 1972); *Morrison v. United States*, 316 F. Supp. 78, 79 (M.D. Ga. 1970) (same).

erroneously claim that the Ninth Circuit did not require any such "official determination," again based upon Petitioners' mischaracterization of the court's decision. In fact, however, the Ninth Circuit stated that, in order for a "time of war" to exist under Section 2680(j), there must be "a deliberate decision by the executive branch" resulting in the engagement of armed forces. *Koohi,* 976 F.2d at 1335. The Ninth Circuit then determined that such a decision had been made herein. *Id.* (the "United States' involvement in naval combat while the Iran-Iraq war was in progress was the result of a deliberate decision on the part of the executive branch to engage in hostile military activities vis-a-vis Iran in order to protect Gulf shipping").[9]

Contrary to Petitioners' assertion (Petition at 21), the record fully supports the Ninth Circuit's conclusion that the Vincennes' actions were the result of a long series of "deliberate actions" by the Executive. For example, Executive Order No. 12170 (1979), initially signed by President Carter, found that "the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States." This order was extended in each year preceding the incident, including the extension by President Reagan on November 10, 1987. *See* Request of Defendant the United States to Take Judicial Notice, submitted in support of the motions below to dismiss the complaints (hereinafter the "Request to Take Judicial

---

[9] Petitioners acknowledge that "[w]ar is a political act which under all prior cases needed to be determined either by the Legislative [sic] or the Executive under an official pronouncement of some nature." Pet. at 16. This statement illustrates that the issues raised herein are non-justiciable political questions. It also conflicts with Petitioners' attempt to demonstrate the "neutrality" of the United States in the Iran-Iraq war simply by quoting from a judicial opinion. *See* Pet. at 13-14, *quoting Lowry v. Reagan,* 676 F. Supp 333, 336 n.13 (D.D.C. 1987). Moreover, just as war is a political act, a qualitative assessment of the sufficiency of the means and methods by which the Executive and Congress effect, implement and sustain war is also a political question. *See Orlando v. Laird,* 433 F.2d 1039, 1043 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971); *Lowry,* 676 F. Supp. at 337 (dismissing action under political question doctrine).

Notice"), Exh. A. *See also* Exec. Order No. 12613, *reprinted in* 3 C.F.R. 256 (1987) (signed by President Reagan, finding that "the Government of Iran is actively supporting terrorism . . . [and] has conducted aggressive and unlawful military action against U.S.-flag vessels and merchant vessels of other non-belligerent nations").

Beginning in early 1987, statements by the President and other members of the Executive branch established the United States' policy to maintain the free flow of oil in the Persian Gulf through the use of the United States military, including the reflagging and escort of oil tankers through the Gulf. For example, in January and February 1987, President Reagan reiterated the United States' determination to maintain the flow of oil through the Gulf. Request to Take Judicial Notice, Exh. A. In March 1987, the United States publicly announced plans to reflag eleven Kuwaiti oil tankers, and, in July 1987, the first two such tankers were escorted into the Gulf by Navy vessels. *Id.*

Other pronouncements confirm this "deliberate decision" of the Executive branch. For example, on May 19, 1987, the Assistant Secretary of State stated that, "the United States Government views the continuation of this conflict [in the Persian Gulf], as well as its potential expansion, as a direct threat to our interests." *Assistant Secretary Murphy's Statement,* 87 Dep't of State Bulletin at 60 (July 1987). On May 29, 1987, President Reagan, in an outline of United States policy, stated, *inter alia,* that the United States "must maintain an adequate presence [in the Persian Gulf] to deter and, if necessary, to defend ourselves against any accidental attack or against any intentional attack." *U.S. Policy in the Persian Gulf,* 23 Weekly Comp. Pres. Doc. 601 (June 1, 1987). Moreover, President Reagan made two reports to Congress on events in the Gulf, on October 10, 1987 and October 20, 1987, "consistent with the War Powers Resolution." *See Communications From the President of the United States,* H.R. Doc. No. 113, 100th Cong., 1st Sess. 2 (1987); H.R. Doc. No. 120, 100th Cong., 1st Sess. 1 (1987).[10]

---

[10] In addition, members of both houses of Congress manifested their belief that a state of war existed in the Gulf through repeated efforts to

Petitioners assert that "time of war" should be interpreted "in light of the existing law at the time of its enactment in 1946" (Petition at 15), and that "at the time Congress enacted the [FTCA] it was clearly the law that determination of 'war' required some official act of government." *Id.* at 17. Petitioners' inability to cite any authority in support of this assertion is not surprising, because the statutory construction analysis used by the Ninth Circuit — to interpret a statute in its modern context — is widely accepted and has been adopted by this Court. *See, e.g., Taylor v. United States,* 495 U.S. 575, 596 (1990) (Court rejected the application of a maxim of statutory construction — "the rule of lenity" — which would cause an interpretation "at odds with the generally accepted contemporary meaning of a term"); *Consumer Products Safety Commission v. GTE Sylvania,* 447 U.S. 102, 108-09 (1980) (Court looked to common usage of the statutory language as the starting point for its interpretation). Moreover, as previously noted, this argument is inapposite, because the Ninth Circuit did require an official act of government — a deliberate decision on the part of the Executive.

No case cited by Petitioners conflicts with the Ninth Circuit's interpretation of Section 2680(j). That statute was not even at issue in *Navios v. The Ulysses II,* 161 F. Supp. 932 (D. Md. 1958), *New York Life Ins. Co. v. Durham,* 166 F.2d 874 (10th Cir. 1948) or *New York Life Ins. Co. v. Bennion,* 158 F.2d 260 (10th Cir. 1946). Rather, each of those cases involved the interpretation of contracts between private parties which included

---

invoke the War Powers Resolution, 50 U.S.C. § 1541, et seq. (1993). *See, e.g.,* H.R.J. Res. 295 and 296, 100th Cong., 1st Sess. (May 28, 1987); S. Res. 1343, 100th Cong., 1st Sess. (June 9, 1987); H.R.J. Res. 310, 100th Cong., 1st Sess. (June 10, 1987); S.J. Res. 194, 100th Cong., 1st Sess. (October 1, 1987); H.R.J. Res. 387, 100th Cong., 1st Sess. (October 22, 1987); S.J. Res. 217, 100th Cong., 1st Sess. (November 10, 1987). Moreover, on August 7, 1987, 110 members of Congress sued the President in an attempt to invoke the War Powers Resolution after three United States warships entered the Persian Gulf on July 22, 1987 and United States forces fired on an Iranian ship laying mines on September 21, 1987. The case was later dismissed based on the political question doctrine and the court's equitable discretion. *See Lowry,* 676 F. Supp. at 337.

a clause regarding war. In any event, these cases are consistent with the Ninth Circuit's holding that no formal declaration of war is required before a state of war may exist and that a phrase must be interpreted within the context in which it appears.

For example, the court in *Navios* stated that the clause at issue should be interpreted as it would be understood by businessmen engaged in the shipping industry (*Navios,* 161 F. Supp. at 941), and that, either under that standard or under the formal rules of international law, a statement by the president of Egypt constituted a declaration of war (*id.* at 943).[11] The issue in *Durham* was the meaning of a clause in an insurance policy restricting coverage for the death of the insured while in the armed forces of a country engaged in war. *Durham,* 166 F.2d at 875. The court stated that private parties may contract as to the meaning of the term "engaged in war," that courts have the duty to construe the term according to that intent and that the parties might contemplate that the country would be engaged in a war that was not politically determined or formally recognized. *Id.* at 876. *Bennion* also involved the interpretation of an insurance policy, which excluded coverage from death resulting from war or any act incident thereto. *Bennion,* 158 F.2d at 261. That court stated, *inter alia,* that "[t]o say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts. We cannot believe that the courts are deprived of the power to deal with this vital question in a practical and realistic sense." *Id.* at 264. The court ruled that a war existed after the bombing of Pearl Harbor but prior to the formal declaration of war by Congress. *Id.*

Petitioners, without elaboration in the body of the Petition, also half-heartedly challenge the Ninth Circuit's dismissal of the claims against the Contractor Defendants on preemption grounds based on the immunity afforded the United States under Section

---

[11] In addition, the definitions cited by the *Navios* court (161 F. Supp. at 939 n.6), which Petitioners claim define war as a formal pronouncement by a sovereign state (Pet. at 18), were actually examples of dictionary definitions of the phrase "declaration of war," not "war." This bootstrapping argument thus provides no support to Petitioners.

2680(j). However, Petitioners do not articulate any specific challenge to the Ninth Circuit's preemption analysis, let alone contend that the analysis was contrary to established legal principles.

In fact, the Ninth Circuit's preemption holding is consistent with established law. As the court determined, one of the purposes of Section 2680(j) is "to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." 976 F.2d at 1337. This determination is consistent with the analyses used by other courts facing analogous situations. *See, e.g., In re Agent Orange Product Liability Litigation,* 818 F.2d 145, 150 (2d Cir. 1987) ("To expose private companies generally to lawsuits for injuries arising out of the deliberately risky activities of the military would greatly impair the procurement process and perhaps national security itself."), *cert. denied,* 484 U.S. 1004 (1988); *Tozer v. LTV Corp.,* 792 F.2d 403, 406 (4th Cir. 1986) (warning of the "danger in transporting the rubric of tort law and products liability to a military setting and military technology. . . . What would pose an unreasonable risk to the safety of civilians might be acceptable — or indeed necessary — in light of the military mission of [a weapon]"), *cert. denied,* 487 U.S. 1233 (1988).[12]

Accordingly, the Ninth Circuit's conclusion that preemption was proper because imposition of liability on the Contractor Defendants "would create a duty of care where [Section 2680(j)] is intended to ensure that none existed" (976 F.2d at 1337), is consistent with the approach taken by this Court in *Boyle v. United Technologies Corp.,* 487 U.S. 500 (1988), upon which the Ninth Circuit relied. *Id.*

---

[12] *See also Harduvel v. General Dynamics Corp.,* 878 F.2d 1311, 1322 (11th Cir. 1989) ("Although the [government contractor] defense may sometimes seem harsh in its operation, it is a necessary consequence of the incompatibility of modern products liability law and the exigencies of national defense") (Powell, J.), *cert. denied,* 494 U.S. 1030 (1990).

CONCLUSION

The Petition does not identify any significant issue of federal law implicated by the Ninth Circuit's interpretation of Section 2680(j) and its application herein, and Petitioners have cited no case with which the opinion below is in conflict. Petitioners' disagreement with the Ninth Circuit's conclusion that the record in this matter provides a sufficient basis to invoke Section 2680(j) is not an appropriate basis for issuance of a writ of certiorari. Therefore, Respondents respectfully urge that the Petition be denied.

Dated: May 14, 1993

Respectfully submitted,

MATTHEW D. POWERS*
ANN E. DIBBLE
WEIL, GOTSHAL & MANGES
Silicon Valley Office
2882 Sand Hill Rd., Suite 280
Menlo Park, California 94025
Telephone: (415) 926-6200

By: MATTHEW D. POWERS
Attorneys for Respondents
General Electric Company,
GE Aerospace and *RCA Corp.*

JAMES K. MEGUERIAN
D'ANCONA & PFLAUM
30 N. LaSalle St., Suite 2900
Chicago, Illinois 60602
Telephone: (312) 580-2132

By: JAMES K. MEGUERIAN
Attorneys for Respondent
Syscon Corporation

*Attorney of Record

ELLIOT E. POLEBAUM
FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 639-7067

By: ELLIOT E. POLEBAUM
Attorneys for Respondent
Computer Sciences
Corporation

ROBERT J. STUMPF
BRONSON, BRONSON & MCKINNON
505 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 986-4200

By: ROBERT J. STUMPF
Attorneys for Respondent
Varian Associates, Inc.

APPENDIX A[1]

5/17/87: An Iraqi Mirage F-1 fires two Exocet missiles at the U.S.S. Stark, killing 37 U.S. Navy crewmen and wounding 21 others.

6/11/87: A bill is introduced in the House of Representatives authorizing "hazardous duty" payments to U.S. military personnel in the Gulf.

7/9/87: An Iranian gunboat attacks a U.S.-owned, Liberian-flagged tanker near Kuwait.

7/24/87: A re-flagged Kuwaiti tanker being escorted into the Gulf by U.S. Navy vessels hits a mine.

8/10/87: A U.S. F-14 aircraft fires two air-to-air missiles at an Iranian F-4 that is perceived to be threatening a U.S. surveillance aircraft.

8/21/87: An Iranian warship approaches a U.S.-led convoy after the U.S.S. Kidd had fired warning shots across the bow of two sailing vessels, but is deterred by the intervention of a U.S. frigate and helicopters.

8/26/87: The Department of Defense announces that it will make "imminent danger" payments to U.S. military personnel stationed in the Gulf.

9/21/87: U.S. helicopters fire machine guns and rockets at an Iranian ship dropping mines into the Gulf, and capture 26 Iranian crewmen who are later returned via the International Red Cross.

9/24/87: The Senate approves an amendment to the Defense Authorization Bill, S. 1174, that states that the Navy would be justified in sinking any Iranian ship attacking a Navy vessel or any ship carrying U.S. citizens.

---

[1] Unless otherwise noted, the following chronology is based on the recitation of events contained in the Congressional Research Service's *CRS Report for Congress*, Pub. No. 88-129 F, *The Persian Gulf, 1987: A Chronology of Events* (1988), attached as Exhibit A to the Request to Take Judicial Notice below.

10/3/87: Four U.S. warships confront 60 armed Iranian speed boats which have been launched against a Saudi Arabian offshore oil field.

10/8/87: Three U.S. military helicopters fire on four Iranian gunboats after the gunboats fired on the helicopters.

10/15/87: An Iranian Silkworm missile hits a U.S.-owned, Liberian-flagged tanker anchored off Kuwait.

10/16/87: Another Iranian Silkworm hits a Kuwait-owned, U.S.-flagged tanker.

10/19/87: Four U.S. destroyers destroy an Iranian oil platform that has been used as a base to launch Iranian speed boat attacks in the Gulf.

11/1/87: A U.S. frigate fires on two speedboats and a dhow that approached a U.S. supply ship as it was escorted out of the Gulf.

4/14/88: The U.S.S. Roberts strikes an Iranian mine in the Gulf.[2]

4/18/88: In response to the attack on the U.S.S. Roberts, President Reagan orders U.S. forces to attack two Iranian oil platforms. While these events are happening, U.S. vessels and military forces are further attacked by Iranian boats, navy vessels, a helicopter and F-14 jets. U.S. forces respond, sinking some Iranian boats and vessels and firing at the F14s.[3]

7/2/88: The U.S.S. Montgomery responds to a distress signal from a Danish tanker under attack by Iranian boats, firing a warning shot which ends the attack.[4]

---

[2]*Letter to the Speaker of the House and the President Pro Tempore of the Senate on the United States Military Strike in the Persian Gulf.* 24 Weekly Comp. Pres. Doc. 493 (April 19, 1988).

[3]*Id.*

[4]Request to Take Judicial Notice, Exh. B.

APPENDIX B

Pursuant to Supreme Court Rule 15.1, Respondents identify the following additional misstatements of fact set forth in the Petition:

1. The opinion below refers to these international passengers as 'members of the enemy military or civilian populations' and partially justifies their death on this ground.

Pet. at 4.

The Ninth Circuit made no such determination, nor was it necessary to do so under the court's analysis, which concerned only whether the passengers were "those against whom force [was] directed as a result of authorized military action." *Koohi*, 976 F.2d at 1335.

2. The aircraft, contrary to the misapprehension of the court below, did not fail to communicate its civilian status to the crew of the Vincennes.

Pet. at 5.

The record below clearly supports the finding of the Ninth Circuit. The crew of the Vincennes issued at least three warnings to the aircraft on emergency frequencies. However, no response to any of these warnings was made by the aircraft, despite the specific direction of Iran Air for the crew to monitor the emergency frequency at all times while operating in the Persian Gulf area. *See, e.g.*, Pet. App. at A-50, 51 and 53. (Respondents also note that additional evidence which refutes Petitioners' statement may be found in portions of the ICAO Report of Investigation that were omitted from Petitioners' Appendix, but were included in the record below. *See, e.g.*, Request to Take Judicial Notice, Exh. B, Sections 2.10.8, 2.12.2 and 3.1.14.

3. No meaningful warnings were given to the aircraft basically because the U.S.S. Vincennes was unfortunately not in radio communication with the civilian air network. The U.S.S Vincennes transmitted a series of messages on UHF military guard frequency, 243MHz, a radio frequency not available on international airliners. A few incomprehensible transmissions were made

> by the U.S.S Vincennes on 121.6MHz, the international guard frequency.

Pet. at 5-6.

In fact, the Vincennes issued three challenges to the aircraft on a non-military frequency which contained sufficient information for the crew to identify the target of the challenge. In addition, the U.S.S. Sides issued another challenge on the same frequency which should also have been clearly recognized. *See* Pet. App. at A-53 and 54.

> 4. In briefing below, the United States admitted this duty [of ordinary care toward non-belligerents, including civilian commercial international aviation or civilian commerce on the high seas].

Pet. at 15 & n.5.

The United States made no such admission, stating only that "the Vincennes had an obligation to avoid unwarranted loss of innocent civilian life." Brief of Appellee United States at 26.

> 5. The court below believed that family survivors of passengers have received *ex gratia* payments. Some have, but very few, about ten (10%) percent and in very modest amounts. *Ex gratia* payments were promised in 1988, but most of the plaintiffs herein have received nothing.

Pet. at 23.

Petitioners' attempt to insert the issue of *ex gratia* payments is unavailing. First, as the record reflects and Petitioners acknowledge in the above statement, the United States has offered to make such payments. See Request to Take Judicial Notice, Exh. E. More importantly, this issue is irrelevant to the questions presented by the Petition and played no part in the decision of the Ninth Circuit.